Dorsey Trailers, Inc. Northumberland, PA Plant *and* United Auto Workers International Union and its Local 1868, International Union, AFL–CIO, CLC. Cases 4–CA–23996, 4–CA–24049, 4–CA–24356, and 4–CA–24423

March 12, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On December 1, 1997, Administrative Law Judge George Alemán issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed a brief in answer to the Respondent's exceptions, the Respondent filed responding briefs to each answering brief, and the General Counsel filed a brief in support of the judge's decision. In addition, the Respondent filed a motion for oral argument and a motion to reopen the record. The General Counsel opposed the motion to reopen the record and the Respondent filed a response to that opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions and to adopt his recommended Order.[2]

The judge found, inter alia, that the Respondent's failure to bargain over unilateral changes in its attendance policy violated its bargaining obligation to the Union. In its exceptions, the Respondent asserts that the judge improperly denied it the opportunity to introduce into evidence two documents—an arbitration decision and a collective-bargaining agreement—that would have provided a defense to its actions. The Respondent contends that the excluded evidence would have established that it had unilaterally implemented a similar change in attendance policy at a different unionized facility (located in Elba, Alabama) which an arbitrator found to have been authorized and privileged by both past practice and the terms of a management-rights clause in the operative collective-bargaining agreement. The Respondent asserts that the wording of the management-rights clause in this case is similar to that at issue in the arbitration decision and should, therefore, be found to be broad enough to encompass the changes in the attendance policy. The Respondent also contends that the judge improperly discredited the testimony of Plant Manager Kenneth Sawyer concerning the similarity between the language in the management-rights clause in the excluded collective-bargaining agreement and the one involved in this case.

We find no merit in the Respondent's exception. First, we find that the judge properly excluded the arbitrator's decision from this record as lacking in relevance and probative value. The excluded arbitration involved events at a different facility, which had its own local management and separately established practices and procedures. It involved an employee unit represented by a different union from the one involved here, which operated under the terms of a different collective-bargaining agreement. The judge was therefore correct in refusing to admit the arbitrator's decision into the record.

Second, the record discloses that, while the Respondent stated its intent to introduce into the record the Elba bargaining agreement containing the purportedly similar management-rights clause, it never proffered that document during the course of the proceeding. Thus, it was not the judge that kept that document out of the record. Instead, the Respondent merely offered Sawyer's testimony concerning the similarity of the two contracts' management-rights clauses. In these circumstances, where the Respondent has failed to provide the actual language of the management-rights clause for comparison, we find that the judge could reasonably both infer that the actual text would not have supported the Re-

[1] In his discussion of the facts at sec. II(B), fn. 7 of his decision, the judge cites an earlier decision involving the same Respondent, *Dorsey Trailers, Inc*., 321 NLRB 616 (1996). The Board there found that the Respondent had unlawfully failed to bargain over its subcontracting of the production of dump trailers. Following the issuance of the judge's decision in this case, the court of appeals declined to enforce the portion of the Board's earlier decision requiring the Respondent to bargain over its decision to subcontract. *Dorsey Trailers, Inc. v. NLRB*, 134 F.3d 125 (3d Cir. 1998). We find that the court's ruling in that case has no impact upon the resolution of the issues in this proceeding. In adopting the judge's decision, we find it unnecessary to rely on our decision in that earlier case.

[2] We deny both the Respondent's motion for oral argument and its motion to reopen the record to admit the transcript and other materials from a July 1997 district court proceeding held under Sec. 10(j) of the Act.

In denying the motion to reopen, we note initially that any rulings in a 10(j) proceeding are not binding on the Board in the unfair labor practice proceeding. *Coronet Foods v. NLRB*, 981 F.2d 1284, 1288 (D.C. Cir. 1993), and cases there cited. In any event, we note that the district court's August 1997 order denying the General Counsel's petition for an injunction was reviewed by the U.S. Court of Appeals for the Third Circuit and remanded with instructions to the district court directing it to issue an injunction. *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243 (3d Cir. 1998). Pursuant to that remand, on November 13, 1998, the district court issued an injunction prohibiting the Respondent from selling, leasing, or otherwise alienating its Northumberland facility, effective through March 13, 1999.

Regarding the Respondent's argument that its motion to reopen should be granted in order to receive evidence from the district court proceeding of the Respondent's financial condition and the likely impact of an order to restore the operations of its Northumberland facility, we note the following. The Respondent was on notice that the General Counsel was seeking a restoration order in this unfair labor practice proceeding. Since the Respondent bore the burden of showing that such an order would be "unduly burdensome" (*Lear Siegler, Inc*., 295 NLRB 857, 861 (1989)), it had the opportunity and the responsibility for adducing any relevant evidence on that point that was available to it at the time of the Board hearing. As for any such evidence that became available only after the hearing before the administrative law judge closed, the Respondent will have the opportunity to introduce it at the compliance stage. Id. at 861–862.

spondent's position and discredit testimony to the contrary. Accordingly, we find no merit in the Respondent's exception to the judge's ruling on the evidence.

We also find the Respondent's reliance upon *United Technologies Corp*.[3] in support of its contentions regarding the scope of the management-rights clause to be misplaced. The question in that case was the extent of the company's power unilaterally to alter its progressive disciplinary procedure for absenteeism. The "Management Functions Clause" at issue provided that United Technologies had "the sole right and responsibility to direct the operations of the company . . . including the *right to make and apply rules and regulations for* production, *discipline*, efficiency, and safety" (emphasis added). It further provided that the company had the right "to discharge or otherwise discipline any employee for just cause."[4] The Board and the reviewing court held that the plain language of the clause gave the company the explicit, unilateral right to make disciplinary rules and to impose discipline pursuant to them.

By contrast, the management-rights clause in this case states only that the Respondent had the "exclusive right to manage the plant and its business, and to exercise the customary functions of management" . . . [and] . . . "to make such fair and reasonable rules, not in conflict with this Agreement, as it may from time to time deem best for the purposes of maintaining order, safety, and/or effective operation of Company plants, and after advance notice thereof to the Union and the employees, to require nondiscriminatory compliance therewith." Unlike the clause in *United Technologies*, which granted explicit authority to make disciplinary rules, the reference to rules in this clause is couched in general terms and does not clearly cover the discipline-linked changes in the attendance policy that the Respondent made here. It is too vague to constitute a union waiver of its statutory right to bargain over changes of the kind made here in the attendance policy. Thus, the decision in *United Technologies* provides no support for the Respondent's position.[5]

[3] 287 NLRB 198 (1987), enfd. 884 F.2d 1569 (2d Cir. 1989).

[4] 287 NLRB at 205–206.

[5] In his analysis of this issue, the judge cites *Elliott Turbomachinery Co.*, 320 NLRB 141 (1995), for the Board's "clear and unmistakable language" standard for finding contractual waiver of the right to bargain over terms and conditions of employment. We note that following the issuance of the judge's decision, on September 30, 1996, the Board vacated its decision in *Elliott Turbomachinery*. While placing no reliance upon that case, the Board continues to adhere to the well-established "clear, unequivocal and unmistakable" language standard for finding waiver and the judge's analysis remains otherwise undisturbed. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), and *Johnson-Bateman Co.*, 295 NLRB 180 (1989), both cited by the judge, as well as *Exxon Research & Engineering Co.,* 317 NLRB 675 (1995).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dorsey Trailers, Inc., Northumberland, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, concurring and dissenting in part.

Although I join my colleagues in affirming the judge's conclusions of law and his analysis of most of the allegations, I disagree with the judge's rationale with respect to the revisions of the Respondent's attendance policy and with respect to the closure and relocation of its Northumberland, Pennsylvania facility.

1. Before February 1, 1995, the Respondent's attendance policy permitted employees seven absences before facing discharge. The policy did not distinguish between excused and unexcused absences, and did not account for tardiness occurrences at all. The changes that the Respondent made to this policy were three-fold: First, it differentiated between excused and unexcused absences and set the number of absences of each category that justified an employee's termination. The new policy was more lax in tolerating excused absences, but more restrictive when applied to unexcused absences. Second, the policy distinguished between absenteeism and tardiness, and delineated the number of tardiness occurrences (absences and tardiness occurrences combined) that warranted termination. The third component of the new policy was the elimination of a carryover feature in the Respondent's longstanding "Safety Bucks" or "Dorsey Dollars" program that rewarded employees for maintaining good attendance and safety records and made employees eligible for prizes awarded in monthly raffles. Under the new policy, the raffles were discontinued.

In my view, only the third component of the new policy constituted a unilateral change in violation of Section 8(a)(5).

As set forth in the management-rights clause of the parties' collective-bargaining agreement, "the Company has the exclusive right to manage the plant and its business, and to exercise the customary functions of management in all respects." The same clause also authorizes the Respondent to make "such fair and reasonable rules . . . as it may from time to time deem best for the purposes of maintaining order, safety, and/or effective operation of the Company."

In my view, the "contract coverage" analysis, set forth by the D.C. Circuit in *NLRB v. Postal Service*, 8 F.3d 832 (1993), is the appropriate test to be applied in determining the legality of Respondent's actions.[1] Under that analysis Respondent had the right, inter alia, to make fair and reasonable rules for the effective operation of the company. Clearly, a rule that deals with attendance is a

[1] See *Central Illinois Public Service Co.*, 326 NLRB 926, 935 fn. 23 (1998).

rule that directly concerns "the effective operation of the company," and the General Counsel has not alleged that the rules promulgated here were unfair or unreasonable. Accordingly, Respondent was privileged to implement them.

In contrast, the Respondent's incentive programs, including raffles and gifts to promote attendance and safety compliance, are terms and conditions of employment to which the management-rights clause does not speak. The elimination of these programs and the discontinuation of the raffles and awards were unilateral changes that violated Section 8(a)(5).

2. I agree that the Respondent violated the Act by transferring bargaining unit work from its facility in Northumberland, Pennsylvania, to Cartersville, Georgia, and closing the Northumberland facility. However, I do not pass upon the issues of whether Respondent engaged in bad-faith bargaining on this subject, whether it presented the Union with a fait accompli, or whether the closing and relocation were motivated by a desire to retaliate against employees for having gone on strike. Rather, I simply agree with the judge that the parties did not reach impasse on November 6, 1995, over the relocation and closure decisions. Thus, the implementation of those decisions was unlawful under Section 8(a)(5).

Donna D. Brown, Esq., for the General Counsel.
Michael S. Mitchell and *James M. Walters, Esqs. (Fisher & Phillips*), for the Respondent.
Stephen A. Yokich, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. Pursuant to charges and amendments thereto filed by United Auto Workers International Union and its Local 1868, AFL–CIO, CLC (the Union) on various dates between June 30, and November 30, 1995,[1] the Regional Director for Region 4 of the National Labor Relations Board (the Board) issued an amended consolidated complaint on October 31, 1996, alleging that the Respondent, Dorsey Trailers, Inc., Northumberland, PA Plant, had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. By answer dated November 14, 1996, the Respondent admitted some and denied other allegations in the amended consolidated complaint, and denied having committed any unfair labor practices. A hearing on the above allegations was held before me in Shamokin, Pennsylvania, from November 18–21, 1996, during which all parties were afforded full opportunity to appear, to call and examine witnesses, to submit oral as well as written evidence, and to argue orally on the record.

On the basis of the entire record in this proceeding, including my observations of the demeanor of the witnesses, and after considering briefs filed by the General Counsel, the Union,[2] and the Respondent,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

Dorsey Trailers, Inc., a Georgia corporation, with corporate headquarters located in Atlanta, Georgia, and the parent corporation of Respondent, is engaged in the trailer manufacturing business. At all relevant times, it maintained two facilities, one in Elba, Alabama, its main facility, where it manufactures dry freight and refrigerated vans, and another in Northumberland, Pennsylvania, the facility at issue here, where, until December 1995, it manufactured flatbed and dump trailers.[4] During the year preceding issuance of the amended consolidated complaint, a representative period, the Respondent, in the course and conduct of its business operations purchased and received goods valued in excess of $50,000 directly from points located outside the State of Georgia. The complaint alleges, the Respondent admits, and I find, that Dorsey Trailers, Inc., Northumberland, Pennsylvania Plant, was at all relevant times herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The complaint alleges, and the answer denies, that the Respondent has violated

1. Section 8(a)(1) by[5]

(a) Threatening employees with plant closure and loss of jobs if they went out on strike.

(b) Creating the impression of surveillance and threatening an employee with unspecified reprisals.

(c) Soliciting employees to bring their grievances to supervisors rather than the Union.

2. Section 8(a)(3) by

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[1] All dates are in 1995, unless otherwise indicated.

[2] As the Union's arguments at the hearing and in its posthearing brief mirror those presented by the General Counsel, reference herein to the General Counsel's claims or contentions incorporate similar claims raised by the Union. Failure to explicitly mention the Union is no indication that its arguments and claims were not duly considered.

[3] References to the General Counsel, Respondent, and the Union's exhibits are herein identified respectively as G.C. Exh., R. Exh., and CP Exh., followed by the exhibit number. Joint exhibits received in evidence are referred to as Jt. Exh. followed by the exhibit number. Cites to testimony contained in the transcripts of the proceedings are identified as "Tr." followed by the page number, and reference to arguments in the parties' posthearing briefs are cited as G.C. Br. (General Counsel's brief), R. Br. (Respondent's brief), or C.P. Br. (Charging Party Union's brief) followed the page number(s).

Following Respondent's submission of its posttrial brief, it requested permission to file a response to the General Counsel's brief, which led to a response by the General Counsel and the Union, which in turn led to another filing by the Respondent. Having duly considered all such motions and countermotions, I deny the Respondent's request along with all other requests submitted by the parties. In sum, I have considered only arguments contained in the parties' initial briefs in rendering my decision.

[4] Flatbed trailers are used for carrying loads such as steel and building materials, while dump trailers are used to haul bulk products such as dirt, sand, rock, and gravel (G.C. Exh. 6).

[5] On brief, the General Counsel raises other issues not alleged as violative of Sec. 8(a)(1), including a claim that the Respondent solicited an employee to withdraw from the Union.

(a) Refusing and failing to grant immediate reinstatement to unfair labor practice strikers upon their unconditional offer to return to work.

(b) Relocating all unit work to a facility in Cartersville, Georgia, and closing its Northumberland facility in retaliation for the employees having gone on strike.

3. Section 8(a)(5) by

(a) Unilaterally instituting a new attendance policy.

(b) Refusing to comply with the Union's request for relevant information.

(c) Failing to give the Union proper notice of and an opportunity to bargain over its decision to relocate all unit work to Cartersville and to close its Northumberland Plant.

B. The Facts

The record reflects that since about 1987, when she executed a leveraged buyout of Dorsey Trailers from its parent corporation, Dorsey Corporation, Marilyn Marks has been Respondent's president and chief executive office (CEO). At the time of the buyout, Dorsey Trailers was comprised of four unionized facilities that included the Northumberland, Pennsylvania, and Elba, Alabama plants, and facilities located in Edgerton, Wisconsin, and Griffin, Georgia.

The Northumberland employees have been represented by the Union since 1967.[6] At the hearing, Marks praised those employees as a highly skilled work force, and stated that the Northumberland facility was the best dump trailer plant in the entire industry. She pointed out, however, that a disadvantage of the Northumberland facility was its distance from major freight lanes, resulting in higher freight costs for the Respondent. During the early 1990s, the Respondent was not a particularly profitable operation. Its then financial difficulties led to concessions being made by the Union during the 1992 contract negotiations between the Respondent and the Union. Of concern to the Respondent during those negotiations was the amount of overtime being paid out and how to reduce the overtime cost. A collective-bargaining agreement was subsequently entered into between the parties effective from March 4, 1992, to March 1, 1995 (Jt. Exh. 1). It appears that following those negotiations, the Respondent's business picked up considerably, so much so that by early 1993, the Respondent, unable to meet the increased demand, began subcontracting production of dump trailers to Bankhead Enterprises in Atlanta, Georgia, owned by Glenn Taylor.[7]

By the start of 1995, according to Northumberland plant manager and admitted supervisor, Michael Gordy, the facility had exceeded expectations in terms of production, efficiency, and profitability. Gordy testified that while the facility needed to grow to increase production of flatbed trailers, the Respondent had already invested more than $100,000, and had an additional $160,000 earmarked for further improvements at Northumberland, but that despite this shortcoming, profits were such by mid-1995 that Respondent expected it to be a banner year. According to Gordy, in 1994 Respondent received an order for 400 flatbed trailers, the largest ever in the industry, and in 1995, received another order from Builders Transport, Inc. for 500 trailers, the largest order received for that year. Production of the order was to begin sometime in mid-July. Gordy further testified that the location of the Northumberland facility was advantageous to Respondent with respect to the dump trailer market because Respondent was primarily a "northeastern regional supplier of dump's," and that while Respondent wanted to expand dump trailer production by building a form of dump trailer known as "walking floor" trailers, it could not due to the increased demand for flatbed trailers which took up much of the facility's production area. Gordy pointed out that building dump trailers in Northumberland was clearly more cost effective than building them in Cartersville, Georgia because the majority of Respondent's dump trailer customers were located in the Northeast, resulting in lower freight costs (Tr. 550).

As noted, the parties' agreement was scheduled to expire on March 1, 1995. By its terms the agreement would be automatically renewed from year to year unless either party gave written notice to terminate 60 days prior to its expiration. On December 7, 1994, the Union gave written notice of its intent to negotiate a new contract (G.C. Exh. 19). Contract negotiations began on February 8, and ended November 6, during which employees engaged in a strike that lasted from June 26 to October 16, when employees unconditionally offered to return to work. In December, the Respondent closed its Northumberland facility and moved its operations to Cartersville, Georgia, where it manufactures flatbed trailers only. It is undisputed that the relocation to Cartersville did not involve a basic change in the nature of the Employer's operation (R. Br. 6; G.C. Exh. 32; C.P. Br. 16–17).

Against this backdrop, I now address the parties' conduct and the events of 1995 which gave rise to this proceeding.

1. The prenegotiation conduct

a. The Union's information request

Union International Representative Robert McHugh testified that in September 1994, during a meeting to discuss attendance-related grievances, Gordy complained that the Company's attendance policy was not working and that he planned to change the method of disciplining employees for attendance problems. In anticipation of the purported change in attendance policy, and to prepare for the upcoming negotiations, McHugh on December 21, 1994, requested certain information from Respondent, including the following:[8]

[6] The Union represents "all production, maintenance and stock room employees of Respondent at the Northumberland Plant, but excluding office clerical employees, professional employees, salesmen, guards, watchmen and supervisors as defined in the Act."

[7] The subcontracting arrangement between Respondent and Bankhead, along with other issues, was the subject of a prior unfair labor practice proceeding, wherein it was alleged that the Respondent violated Sec. 8(a)(5) and (1) by not bargaining over the decision to subcontract, by unilaterally assigning employees to light duty outside their normal departments, and by failing to furnish the Union with information regarding the subcontracting and the light duty changes. See *Dorsey Trailers, Inc.*, 321 NLRB 616 (1996), modified in 322 NLRB 181 (1996). The Board there found, contrary to an administrative law judge, that the decision to subcontract was a mandatory subject of bargaining, and that Respondent's refusal to bargain over its subcontracting decision, and to provide information relative thereto, violated Sec. 8(a)(5) and (1). It did, however, agree with the judge that Respondent further violated the Act by unilaterally assigning unit employees to light-duty work outside their normal light-duty work outside their normal departments or classifications, and by refusing to furnish the Union with information relating to such unilateral assignments and to its subcontracting decision. The Board's decision, it should be noted, issued after the negotiations had concluded and the Northumberland facility closed.

[8] The record does not make clear if the other items sought by the Union in the December 21, 1994 request were ever provided.

DISCIPLINE PROCESS

B. For each employee, provide the current number of "occurrences" that such employee has on file in the existing attendance policy and the date of each employee's last occurrence.[9]

EMPLOYMENT RECORDS

A. A listing of each location where the Company keeps and/or maintains any employee records. [G.C. Exh. 17, pp. 8–9.]

Respondent's vice president for human resources, Kenneth Sawyer, testified that he and Gordy discussed the above information request soon after Gordy received it and that "it was my understanding they [the Union] wanted the documentation of the occurrences and the discipline that each individual employee had" (Tr. 632). The Respondent apparently did not provide the Union with above information, and on February 8, the first day of negotiations, McHugh renewed his request (C.P. Exh. 5, p. 2; G.C. Exh. 47, p. 4).

At some point after February 8, the Respondent thereafter agreed to let the Union personally review the employee personnel files for such information. Sometime in March, Bower and Union President Barry Attinger spent approximately 1 week reviewing the employee files looking for occurrences (Tr. 332). Bower testified that while he anticipated finding the occurrences issued to employees prior to 1995 in their personnel files, except for some personal handwritten notes found in a file, he and Attinger did not find what they were looking for. Attinger testified, without contradiction, that following his search of the personnel files, he questioned Respondent's personnel administrator, Sheldon Winnick, as to whereabouts of other attendance records where occurrences might be kept, and Winnick responded he did not know. The above-requested information has apparently never been furnished to the Union.

b. The attendance policy

In January 1995, Gordy announced to employees that he was changing the Company's attendance policy. Bower, who was present during Gordy's announcement, advised Attinger of the change, and recommended they meet with Gordy to request bargaining over the change in the attendance policy. A meeting was thereafter held with Gordy at which time Gordy offered to bargain with the Union over the "effects" of the change but not about the decision itself. On February 1, the new attendance policy was put into effect. In a February 2 letter, Attinger and Union International Representative Robert McHugh again insisted that Respondent bargain over the new attendance policy, stating that the policy was a unilateral change in the unit employees' wages, hours, and other terms and conditions of employment. However, in a February 7 letter, Gordy disputed that Respondent was obligated to bargain over the new attendance policy and disagreed that the policy had changed any of the employees' terms and conditions of employment. Gordy's letter went on to state that if the Union wished to discuss the new policy, the upcoming contract negotiations was the time and place to do so (G.C. Exh. 7).

A comparison of the new and old attendance policies reveals that Gordy was not being truthful in advising the Union that the new policy did not affect the employees' existing terms and conditions of employment (compare, R. Exh. 1 and R. Exh. 2). The new policy, for example, draws a distinction between excused and unexcused absences, and allows employees to accumulate up to 12 excused absences before facing termination, while limiting the number of unexcused absences to 3 before discharge is imposed. The old policy did not distinguish between excused and unexcused absences, and allowed an employee seven occurrences before facing discharge. Thus, while the new policy is apparently more favorable to employees in terms of the number of excused absences that could be accumulated, under the old policy employees were given greater leeway with respect to their unexcused absences, as they were allowed to accumulate seven occurrences before being subject to discharge. This contrasts sharply with the new policy's more restrictive "three unexcused absences and you're out" approach. Further, while the old policy drew a distinction between absenteeism and tardiness for purposes of assigning occurrences (e.g. 1, day's absence = 1 occurrence; one tardy = ½ occurrence), the new policy does not, and treats either a missed workday or a tardiness as equal to one occurrence. The change meant that whereas employees were previously permitted to accumulate up to 14 tardies (e.g., 14 tardies @ ½ occurrence each = 7 occurrences) before facing possible termination, the new policy subjected them to discharge after only 12.

The new policy also eliminated a provision of the old policy that allowed employees to obtain a preapproved absence from their immediate supervisor, and eliminated as an excused absence instances where employees are required to appear in a civil proceeding or have been subpoenaed as a witness. Finally, the new policy changed the Company's longstanding "Safety Bucks" or "Dorsey Dollars" financial incentive program designed to reward employees for maintaining good attendance and safety records. Thus, where in the past employees were allowed to carry over their accumulated "Safety Bucks" from 1 year to the next, the new policy eliminated the carryover feature, as well as a monthly drawing associated with the program through which employees could receive prizes such as a set of screwdrivers or wrenches, AM/FM radio, etc. (Tr. 315–316).

2. The prestrike negotiations and other activity[10]

[9] "Occurrences" were issued to employees for violation of the Company's attendance policy.

[10] The Union's rather extensive bargaining notes, covering all bargaining sessions held between February 8 and November 6, were received in evidence as G.C. Exh. 47 after being duly authenticated by union notetaker Purcell, and consist of an actual copy of Purcell's handwritten notes. The "official" copy of Respondent's bargaining notes was also received into evidence as C.P. Exh. 5. The Respondent's notes, consisting of 55 typewritten pages, apparently were taken in handwritten form and then put in typewritten form by Winnick. The Respondent's notes are not as detailed or as thorough as the Union's notes, and do not contain the notes of the last session between the parties held November 6. Unlike Purcell, Winnick did not testify and consequently did not authenticate the Company's notes or explain the absence of the November 6 notes. The Company's notes were instead identified by Gordy, with Mitchell's assistance. Mitchell, who only attended the last four meetings, nevertheless proffered that Winnick took the notes in longhand and subsequently put them in typewritten form, and that the notes constituted Respondent's "reasonably accurate attempt to portray what was going on" during bargaining (Tr. 560–561). As between the Respondent's typewritten notes and the Union's more detailed handwritten notes, I find the latter to be a more trustworthy account of what transpired during negotiations, and where any differences exist between the two, I have accepted the Union's notes contained in G.C. Exh. 47 as the truer and more reliable version.

Actual negotiations for a new contract, as noted, got under way on February 8. The Respondent's negotiating team consisted of Vice President for Human Resources and Chief Spokesperson Kenneth Sawyer, Gordy, and Winnick. Representing the Union were McHugh as chief spokesperson, Attinger, Bower, recording secretary and union notetaker, John Purcell, and employee representatives Teresa Goguts, Ralph Kerstetter, Loreen Artley, Bob Hummel, and Mike Carter.

The February 8 session began with a general discussion by Respondent of its improved financial picture, and the Union responding that this should result in a better economic package for employees. The parties agreed to discuss noneconomic issues first, and the Respondent made it clear that mandatory overtime for employees and subcontracting rights were its key issues. The record, and in particular the parties' bargaining notes, reveals that during the first bargaining sessions the parties reached quick agreement on such issues as a recognition clause; dues checkoff; union shop committee provision; an indemnification/hold harmless provision; proportional representation provision (art. 2); seniority (art. 5); "Lost Time and Incomplete Day's Work" provision; safety and health; and a leave of absence provision (G.C. Exhs. 24, 25).[11] The parties, however, had difficulty agreeing on such issues as extension of the probationary period for new employees (the Respondent sought to extend the period from 60 to 90 days), modification of the grievance arbitration procedure, the scope of a "disciplinary procedures" provision, work assignment/job bidding language, as well as the mandatory overtime and subcontracting issues.

The bargaining notes reflect that at the February 23 meeting, Sawyer told the Union that the need for mandatory overtime remained a critical issue for the Company, pointing out that he had been specifically instructed by Marks that mandatory overtime was a must, and that the Company was willing to take on a strike to achieve this goal. Sawyer made it clear that the Company was prepared for a work stoppage (C.P. Exh. 5, p. 13). In fact, Sawyer related to the Union during the course of negotiations that Marks had stated she would shut the plant down if agreement could not be reached on subcontracting and mandatory overtime (Tr. 17).[12]

At the February 24 meeting, the Union proposed elimination of the management-rights clause, claiming that the Respondent always relied on that provision in disputes between the parties to support unilateral action and avoid its bargaining obligation. McHugh also asked for information on Respondent's subcontracting arrangement with Bankhead Enterprises in Georgia which, as noted, was the subject of a prior unfair labor practice proceeding (see fn. 7, supra), stating the Union needed the information to bargain intelligently over the subcontracting language being sought by the Company. Gordy, however, re-

The Respondent also produced another set of bargaining notes purportedly of the last four meetings (October 13, 19, 26 and November 6) which it claims were taken by Respondent's vice president of administration, Paul Morrow (the "Morrow" notes). As with its other notes, the Respondent did not call Morrow to authenticate this other set of notes. The Respondent instead relied on Mitchell's representation that Morrow was the author of the notes, that they were initially taken in handwritten form and then recorded on audiotape, and that Morrow then put them in the typewritten form in which they were offered into evidence. While I received the "Morrow" notes into evidence without objection from the parties (see R. Exh. 28), I did so with much skepticism as to their reliability and authenticity. Thus, despite Mitchell's representation that these notes were taken personally by Morrow himself in handwritten form, the notes of the November 6 meeting contain an account of an alleged off-the-record discussion between Mitchell and McHugh that was not recorded by Morrow at the meeting. Rather, the notes suggest that the account of the Mitchell-McHugh discussion was purportedly prepared on audiotape by Mitchell on his to the airport at some point in time after the meeting and allegedly was his recollection of what was discussed between the two. Thus, Mitchell was being less than candid in asserting that these were "the notes Mr. Morrow took of these four meetings," for clearly they were not all taken by Morrow (Tr. 645). While I was at first blush inclined to view Mitchell's above assertion as an innocent misrepresentation, his admission at the hearing to having twice reviewed the notes, e.g., when they were initially made and just prior to the hearing, unquestionably establishes his familiarity with the contents of R. Exh. 28, and persuades me that his misrepresentation was knowingly made. While an exchange between Mitchell and McHugh did occur (Tr. 218), I place no credence on the account of that exchange contained in the "Morrow" notes (R. Exh. 28, pp. 21–22) and find them to be purely self-serving. Interestingly enough, Morrow, the purported author of the R. Exh. 28, did record other off-the-record discussions. Yet, no explanation was offered by Respondent as to why he would not have recorded this particular exchange between Mitchell and McHugh. Mitchell himself makes no reference in his testimony to this off-the-record discussion. For these reasons, and the fact that the "Morrow" notes contain self-serving depictions of McHugh's demeanor as being "confused," as well as some self-serving, gratuitous parenthetical remarks added by the preparer of the notes, I question the reliability of the "Morrow" notes and have given it little weight in my findings here. To the extent R. Exh. 28 conflicts with the Union's notes of the last four bargaining sessions contained in G.C. Exh. 47, the latter is deemed controlling.

[11] However, despite having agreed to dues-checkoff language, on June 8, the Respondent notified the Union it would no longer check off union dues after the next pay period because it was legally prohibited from doing so in the absence of an agreement. The Union responded by letter dated June 12, that dues checkoff was a term and condition of employment that Respondent was obligated to continue, and that it saw no legal impediment to Respondent's obligation to continue doing so, and noted that employees had ratified all interim agreements reached by the parties during the negotiations, including the agreement on the dues-checkoff provision.

[12] Questioned at the hearing as to what he may have said at this meeting, Sawyer became evasive. Asked if he had ever told the Union that Marks had made such a comment, Sawyer stated only that the Union had been advised these two issues were "crucial and very important in the long-term future of the Northumberland facility." Pressed by the General Counsel to explain if this meant he did make the comment to the Union, Sawyer responded, "I don't know that I used the word 'shut the plant down;' We told them it was crucial for the long-term existence of the plant'' (Tr. 18). Despite hedging his answer, Respondent's own bargaining notes reflect that during the February 24, bargaining session, Sawyer remarked, "[W]e could be negotiating the effects of a plant closing," further stated that "Marks has to make a decision to keep Northumberland opened or move southeast to another plant to remain competitive," and that the "ultimate decision will be that this plant will close and we'll move south." (C.P. Exh. 5, p. 15–16.) Thus, Sawyer's rather flimsy denial that he made such remarks is not credited. Marks, it should be noted, testified she never gave her bargaining team any specific instructions, that her directions were simply strategic, and that her only instructions were to "get a contract, you know, make sure we can earn a profit based on whatever economics are there" (Tr. 688). However, the bargaining notes, as indicated, contradict Marks for they clearly show Sawyer informing the Union that Marks was insistent on obtaining subcontracting and mandatory overtime. Although evasive in his testimony, Sawyer never expressly denied that Marks had given him such instructions. Given these circumstances, Marks' above testimony is found not to be credible.

minded McHugh that the judge in the prior proceeding had found that the Company was not engaging in subcontracting, and that consequently the Respondent was not obligated to bargain over such work. McHugh responded that the judge had found the Company was engaging in subcontracting, and insisted that the Company was engaging in bad-faith bargaining by refusing to provide the information. The bargaining notes reflect that Respondent thereafter agreed to furnish the subcontracting information, but advised that the information was not in written form and that "Mike is working on getting this info down on paper." It cautioned, however, that the information might not be available on time. The Union's bargaining notes similarly show Sawyer warning that if production requirements were restricted, the Respondent "could shut the plant down and move all the work out." Sawyer told the Union that he was not threatening them but simply stating that this could happen, that Respondent was not trying to take away employees' jobs but rather wanted to keep a plant "up here in the North" (G.C. Exh.-47, 2/24 bargaining notes).[13]

Although his testimony was full of self-contradiction and confusion, Sawyer readily admits having repeated the "plant closing" theme on numerous occasions. Thus, when asked on direct examination by Respondent's counsel when he first made his remark, Sawyer claims it was first mentioned to McHugh and the rest of the bargaining committee "some time after the strike" began. However, on cross-examination by the Union's counsel, Sawyer admitted that beginning with the first bargaining session and on numerous occasions thereafter he made it clear to the Union that unless these issues, referring to the subcontracting and mandatory overtime, were resolved there was a possibility the plant would close (Tr. 607; 625).

Despite reaching agreement on a variety of issues, by March 7, the Respondent was apparently getting fed up with the pace of negotiations and its inability to arrive at an agreement. Thus, following a lengthy session on March 7, Sawyer complained that the parties were "wasting time." He and the other company representatives thereafter walked out of the meeting stating that "when the Union is serious about talking about the contract, to let them know," in the meantime, he and the others were going back to the plant to work on the Company's strike plan.[14] The parties met once in March and eight times in April. At an April 6 session, agreement was reached on retention of a 60-day probationary period (G.C. Exh. 24). Three meetings were held in May.

On May 25, the Union held a membership meeting during which employees ratified the contract language already agreed to by the parties, including the dues-checkoff provision and the 60-day probationary provision for new hires. Employees also rejected all other company proposals that were not supported by the union bargaining committee. McHugh claims that after the meeting, he called Gordy to inform him of the membership vote, and that Gordy replied, "Sorry to hear that."

On June 8, Gordy notified the Union that despite the parties' agreement to continue in effect the terms and conditions of the expired contract during negotiations, the Respondent was prohibited by law from continuing to check off union dues in the absence of a signed, written agreement and that, consequently, it would no longer do so as of the next pay period. Gordy further indicated that Respondent was willing to discuss extending the old contract for a period of time (G.C. Exh. 28). McHugh responded that dues checkoff was a term and condition of employment that Respondent was required to continue, and that he saw no legal impediment to Respondent's ability to continue doing so. McHugh further noted that the dues-checkoff provision was one of several proposals that the parties had already agreed to and been ratified by its members, and that while Respondent had made several unilateral changes since March 1, in the employees' terms and conditions of employment the Union was not inclined to turn the other cheek every time such a unilateral change was made. He again insisted that Gordy not discontinue dues checkoff.

At some point during the early stages of the negotiations, e.g., early spring, Bankhead's owner, Taylor, according to Marks, personally notified her that he was planning to sell his Cartersville, Georgia trailer manufacturing business. Marks became acquainted with Taylor through membership in an industry association, and eventually became a close business associate of his by virtue of the subcontracting arrangement entered into in early 1993, when Taylor began manufacturing dump trailers for Respondent at his Bankhead facility in Atlanta, Georgia. Marks explained that Taylor decided to personally notify her of his intent to sell his Cartersville business so that she would not hear the news from the street and be concerned it might affect their existing subcontracting arrangement. Taylor, however, went beyond mere notification, for later that summer he reported to Marks on the status of his attempt to sell the business, advising her that while negotiations for the sale had at first broken off, he managed to get the negotiations restarted and had indeed succeeded in selling the business. By letter dated August 4, Taylor informed Marks that he had sold the business to Cottrell, Inc., and that he expected to complete existing orders in several months.

Aside from her statement as to why Taylor initially contacted her, Marks offered no explanation as to why Taylor would continued to communicate to her the details of the success or failure of the sale of his business. What is apparent from her testimony is that she and Taylor maintained close communications and that he kept her abreast of what was happening with his facility (Tr. 715). There is no question that their relationship was a cordial one, as evident from the August 4 letter wherein Taylor expresses his appreciation for his relationship with Marks. Although Marks claims she did not view Taylor's August 4 letter as significant, she offered no explanation as to why

[13] The notes do not make clear if the "Mike" being referred was Mike Gordy, Company Attorney Mike Mitchell, or some other individual. The Company's bargaining notes also reflect a claim by Gordy that the Company could not possibly give the Union the information "within this period of time." While neither set of notes explains the timing problem which the Respondent was alluding to, Sawyer's subsequent comments, found in the Company's bargaining notes, leads me to believe that the timing problem related to a possible closure of the Northumberland facility. Thus, the Company notes reflect that in response to McHugh's inquiry regarding the information, Sawyer replied, "We're getting the best legal advice, we want and must have the right to have subcontracting, to augment what we're doing already. We enjoy our N.E. location, Marilyn Marks has to make a decision to keep Northumberland open or move southeast to another plant to be competitive. We need flexibility to be cost-effective . . . The ultimate decision will be that this plant will close and we'll move south; as much as 60% of the business is in the southeast. We've been handcuffed up here for the last 2 to 3 years." (C.P. Exh. 5, pp. 15–16.)

[14] McHugh's suggestion that Sawyer also remarked, "[L]et the strike begin," is not supported by the bargaining notes. I do not, however, believe McHugh intentionally lied about hearing the remark. Rather, his assertion was, in my view, an innocent misunderstanding as to what he may have heard Sawyer say that day.

she sent a copy of the letter to three of the Company's highest executives, to wit, its vice president of finance, Charlie Chitwood, vice president of sales, Charlie Mudd, and vice president of engineering, David Kemp (G.C. Exh. 52).

3. The strike begins

The Union began a strike at 6 a.m., Monday, June 26. The employees had previously authorized the union leadership to call a strike if it was deemed necessary. At a February 24 meeting, the union leadership discussed with employees the differences between an economic strike and an unfair labor practice strike, and stressed that to be eligible for State unemployment benefits during a strike, it was necessary to have any walkout classified as an unfair labor practice strike. The Union identified certain conduct already engaged in by the Respondent that could be used to support such a strike, including, inter alia, its unilateral implementation of the new attendance policy and the concomitant elimination of the "Dorsey Dollars" program, its issuance of written warnings to union officers for conducting official union business, the refusal to provide the Union with information regarding the subcontracting of unit work, and the threats to close the plant made by Supervisor Keith Reader to various unit employees. McHugh, according to the Union's internal notes, told employees that they "have to get the Company to make changes in the terms and conditions of employment so we can use them for an unfair [labor practice strike]." He further stated that the Respondent was getting frustrated, and that Sawyer had made the comment, "Let the strike begin" on walking out of the prior session. The employees then voted to rely on these factors in the event a strike was called (R. Exh. 17, pp. 16–18).

At a June 24 meeting, the union leadership recommended, and employees agreed, to commence a strike on June 26. The motivation for the strike was to be the unfair labor practices discussed during the February 24 meeting, as well as other conduct engaged in by Respondent since then, including Respondent's attempt to resolve grievances without union involvement, its decision to discontinue dues checkoff, and the forced transfer of employees from one classification to another (R. Exh. 17, pp. 39–40; Tr. 195). A picket line was established on June 26, with employees carrying signs that read, "UNFAIR LABOR PRACTICE" and "LOCKED OUT." On or about July 13, the Respondent hired temporary workers through Worldwide Labor Support of Miss., Inc. to perform the struck work (Jt. Exh. 2).

The strike lasted from June 26, to October 16, at which time the employees made an unconditional offer to return to work (G.C. Exh. 30).

The Respondent contends it was not prepared for a strike and was caught off guard when employees walked out on June 26 (R. Br. 40). Marks testified in this regard that she "was just very surprised" by the strike, almost in "disbelief," that employees had walked out, and that she further anticipated the strike would be short lived and "thinks" she may have told Respondent's board of directors it would not last more than 1 week (Tr. 689). However, Marks' above remarks, and Respondent's suggestion that it was not prepared for the strike, is simply not credible in light of evidence suggesting otherwise. For example, approximately 1 month before negotiations had even commenced, Gordy wrote to Bankhead Enterprises President Frank Felder explaining, inter alia, that work may need to be transferred to Bankhead in the event of a strike at Northumberland (G.C. Exh. 8, p. 2). Clearly, such remarks suggest that the Respondent was making preparations for a strike some 6 months before it actually occurred. Gordy's testimony that he discussed security arrangements prior to the strike with the Company's regular guard service provider, Wells Fargo, also reflects prestrike preparations by Respondent. Finally, Sawyer's own comment during the February 23 bargaining session, that the Company "was prepared for a work stoppage," and the statement by Respondent's negotiators as they walked out of the March 7 bargaining session, that they were going to work on their strike plans, belies Respondent's claim to having been caught by surprise by the June 26 strike. While I have no doubt that the Respondent did not precisely when or if a strike might be called, I nevertheless remain convinced that Respondent had anticipated and was indeed prepared to take on a strike.

4. The July–September bargaining sessions

The pace of negotiations slowed considerably once the strike began, with the parties meeting only twice in July. At the July 6 session, McHugh renewed his objection to the discontinuation of dues checkoff, and reiterated that both sides had signed off on this proposal, that it had been ratified by the union membership, and that employees had agreed to work under preexisting terms and conditions, including the dues-checkoff requirement. The Respondent in turn adhered to the view that Board law prohibited it from doing so. When McHugh asked if the other interim agreements reached by the parties remained in effect, Sawyer responded that it didn't matter as the employees were not working. Sawyer further informed the Union that he was withdrawing the overtime proposal that was on the table prior to the strike. Gordy explained that Respondent chose to withdraw the proposal because it was too liberal, and suggested that as Respondent appeared to be weathering the strike it thereafter intended to present the Union with more stringent proposals (Tr. 569–570). The July 6 meeting lasted approximately 1 hour. A July 28 meeting was even shorter, lasting less than one-half hour. Although neither side presented any new proposal, Sawyer, in keeping with his July 6 comment that Respondent would present more stringent proposal, revised the probationary period language that had previously been agreed to by the parties by proposing that the period be increased from 60 to 90 days. No meetings were held in August, and while the parties met for about 20 minutes on September 12, no progress was made.

Sawyer admitted that during one of the above three bargaining sessions, he could not recall which, he mentioned to McHugh and the rest of the Union's bargaining committee that "unless we can come to some kind of agreement and get people back to work and stop hemorrhaging, that this work action was putting the future of the plant in jeopardy" (Tr. 607). He further recalled telling McHugh during a phone conversation the week of September 17, "I have a lot of friends that work at this plant, there are a lot of people who have worked here their entire adult life, and I'm afraid that if this thing doesn't get settled real soon, and I'm talking about in the next several days, that this thing is going to be taken out of our hands" (Tr. 609).

5. The acquisition of the Cartersville facility

According to Marks, as the strike dragged on the Company's losses mounted, with Respondent virtually overnight going from a $300,000 monthly prestrike monthly profit to a monthly loss after the strike of about the same amount as customers began withdrawing orders, forcing the Respondent to cancel orders for supplies and materials. Seeking to maintain produc-

tion levels, the Respondent put its salaried employees to work the production line, and hired temporary workers through Worldwide Labor Support.[15] Respondent purportedly sought to get its competitors to perform some of the struck work. Marks testified to having personally contacted her competitors, including Osh Kosh Trailers and Pine Trailers, to see "if they could build a Dorsey product for us" that Respondent would deliver to its customers under its own label in the hopes of keeping them from going to the competition (Tr. 691).

a. The September 25 management meeting

On September 25, Marks chaired a meeting attended by Sawyer, Gordy, Finance Vice President Charlie Chitwood, Sales Vice President Charlie Mudd, Engineering Vice President David Kemp, and Plant Manager Doug Allgood, intended as a "brainstorming" session to discuss ways of coping with the ongoing strike. Marks, Gordy, and Sawyer all provided testimony as to what was discussed at the meeting, with Gordy providing the greatest detail, followed by Sawyer, and then Marks.

The purpose of the meeting, according to Gordy, was to discuss the impact of the strike on production, and to determine if the Company should cave in to the Union's demands. The high cost of continuing to use temporary workers was also discussed, and the hiring of permanent replacements was also considered but rejected because of a belief it might be too difficult to acquire a sufficient number of qualified workers. Also considered and rejected was the possibility of using competitors to perform the work. At some point during the meeting Marks, according to Gordy, mentioned that maybe Bankhead's owner, Taylor, might be able to help out, stating she had learned Taylor was selling his Cartersville business and was actively looking for other business to put into that plant. Gordy explained that the thought being considered was that since Taylor was already building dump trailers, he might be willing to enter into a subcontracting arrangement to build flatbed trailers as well, and this would allow Respondent to keep some production going. After a short recess, Marks informed the attendees that she had just spoken by phone with Taylor and that the latter had expressed an interest in selling the Cartersville facility to Marks. Gordy stated that he, Allgood, and Owens were selected to go inspect the facility and ascertain its potential (Tr. 543–547).

Sawyer's version was not very different from Gordy's. According to Sawyer, the purpose of the meeting was to determine how to stop the "bleeding," and that there was general agreement that caving in to the Union was not a viable option because the Company had already taken a beating and it would not be the sensible thing to do. Other options considered and rejected included continued use of temporary replacements, farming out the struck work to other manufacturers, and advertising for permanent replacements. The latter was not deemed feasible because of the difficulty in hiring such employees and in getting them to cross a picket line in a hostile environment. Also considered was the possibility of increasing subcontracting to Bankhead. This, however, was rejected because Bankhead was already at full capacity. Other options discussed, according to Sawyer, was transferring work to Respondent's Elba facility. This too was rejected for similar reasons and because as a unionized work force, the Elba employees would not be willing to perform struck work. At some point in the meeting, almost as an afterthought according to Sawyer, Marks mentioned "[S]he had learned earlier that the Cartersville operation of Bankhead Enterprises . . . had been sold to their only competitor and that they were looking for work to put into that plant.'' Following an afternoon break, Marks returned to the meeting and stated she had just spoken with Taylor, and that the latter "had been receptive to the idea of trying to work together with us on the subject and had invited her to send out two or three of her operations people to take a look at the facility and see if it was something that made sense." Sawyer testified that after the meeting, Gordy, Allgood, and Owens drove to the Cartersville plant to conduct a tour of the facility (Tr. 601–605).

Marks' account of the meeting was somewhat sparse. She recalled that the management team gathered to discuss various options, including trying to get Respondent's competitors to build flatbed trailers for Dorsey, and bringing in salaried workers from other Respondent-owned facilities to help with production. Marks claims that at some point during the meeting someone, probably even herself, asked what had happened to "our friend's plant up in Cartersville?" Marks purportedly went around the table asking if anyone knew what Taylor had done with the Cartersville facility, and received no response. After this purported round of inquiries, Marks claims she tried calling Taylor to ask about the facility, but instead reached Bankhead President Felder, who told her the Cartersville business had, in fact, been sold, that no other work had been found for the facility, and that the new owner was not interested in the actual Cartersville facility itself. She claims she returned to the meeting and advised the others of her conversation with Felder, and that the latter had suggested they visit the Cartersville facility. According to Marks, she thereafter directed Gordy and his boss, Allgood, to visit the facility, and does not recall if she also asked Sawyer to go with them (Tr. 690–694; 715).

On cross-examination, Marks admitted that while she tried to get her competitors to perform the struck work, she never bothered to check with Taylor to see if such work could be performed at Cartersville, despite her further admission that she learned soon after being notified by Taylor of the sale that the facility itself was not included in the transaction and that Taylor would be looking for other work to put into that facility. Asked to explain why she did not do so, Marks attributed it to "shortsightedness," noting that it simply never occurred to her to follow up on the sale, and that the matter "just left my mind." Sensing the implausibility of her response, Respondent's counsel prodded Marks on redirect examination to elaborate further on why it would not have occurred to her to contact Taylor. Her further answer—that "it never occurred to me that we were not going to be able to settle, settle the Northumberland strike or reach a contract there"—in my view is equally as implausible, for this same consideration obviously did not inhibit her from contacting other competitors. Marks' above explanation simply does not ring true and is not credited. Given her close and longstanding business relationship with Taylor, and the fact that she knew of Taylor's interest in finding additional work for that facility, I have difficulty accepting Marks' assertion that at no time prior to September 25, did she discuss with Taylor the possibility of subcontracting work to, or actually purchasing, the Cartersville facility.

[15] The Respondent's agreement with Worldwide Labor contains a "Cancellation Charge" provision that guarantees 40 hours pay for each temporary employee for the first week, with no further liability ensuing for cancellation after the first week (R. Exh. 23, p. 5).

There are, however, other reasons for doubting for Marks' claim that the idea of using Cartersville to perform Northumberland bargaining unit work first came to her as an "afterthought" at the September 25 management meeting. At an October 13 meeting (discussed infra), Mitchell, according to the Union's bargaining notes, told the Union that Respondent had been "actively" talking to Taylor regarding the purchase of his facility "for the last 3-½ weeks," thereby suggesting that such discussions had been ongoing since September 19 or 20, and contradicting Marks' assertion that the matter was raised for the first time at the September 25 meeting. Sawyer's admonition to McHugh during the week of September 17, that the Union should end the strike within the next several days or the matter would be taken out of their hands, further convinces me that the Cartersville acquisition was being discussed prior to September 25. Although Sawyer did not explain what if anything he expected to happen within the next day that would affect the contract talks, given Mitchell's above remarks regarding the timing of such talks, it is reasonable to assume that Sawyer was referring to the ongoing negotiations between Marks and Taylor, and of the likelihood that an agreement for the Cartersville facility seemed imminent. In light of the above, Marks' testimony that the idea of relocating to Cartersville was first raised at the September 25, meeting is found not to be credible.

Although Sawyer and Gordy seem to corroborate Marks in this regard, several inconsistencies in the testimony of all three witnesses as to September 25 meeting cause me to doubt the truthfulness of their accounts. Both Gordy and Sawyer, for example, claim that Marks told the group she had had a phone conversation with Taylor regarding the Cartersville facility. Marks, however, claims she told the group she had spoken with Bankhead's president, Felder, not Taylor. Further, although Gordy claims Marks reported to them that Taylor had expressed an interest in selling the facility to her, no mention of Taylor's purported interest in selling Cartersville is found in either Marks' and Sawyer's account. Moreover, while both Gordy and Sawyer claim it was Marks who first raised the issue of the Cartersville facility at this meeting, Marks herself was not certain if she, or someone else, broached the subject. Nor did Gordy or Sawyer make mention in their testimony of Marks going around the room asking each one present what they knew about Cartersville. While I do not doubt that a management meeting was convened on September 25, and that the strike was the subject of discussion, I reject as without merit the Respondent's claim that the idea of purchasing the Cartersville facility was raised for the first time at this meeting. Support for the view that Respondent was considering the purchase long before September 25, came from employee Yvette Derr. Derr, a unit employee, had gone on strike with other employees, but chose to return to work on August 28. She testified, credibly and without contradiction, that during the first 3 days after her return to work, she rode to work with Keith Reader, an admitted 2(11) supervisor, and that on one of those occasions, Reader mentioned to her that the Respondent had purchased or was in the process of purchasing a plant in Georgia (Tr. 378–380). Although Reader testified at the hearing, the Respondent made no effort to elicit a denial of Derr's account from him.[16]

[16] Remarks made by Marks in a March 7, 1996 Annual Report to Stockholders, further support the view that Respondent's interest in purchasing the Cartersville facility may in fact have predated the strike. Thus, in her annual report, Marks told her shareholders that "after 18-weeks of unproductive negotiations, we decided to establish a new facility in North Georgia" (G.C. Exh. 6, p. 2). Marks was not questioned about her remarks, leaving one to speculate as what 18-week period she was referring to. It is, however, unlikely that she was referring to the 18 weeks following the start of the strike on June 26, e.g., circa October 27, for, as more fully discussed below, the decision to purchase by Respondent's own account occurred no later than October 5, several weeks before October 27. Indeed, I find it more likely than not that Marks was referring to the 18 weeks after the start of negotiations on February 8, e.g., circa, June 8. In this regard, I find significant that Marks in her remarks refers to the "unproductive negotiations," and not a need to perform struck work or maintain production, as the basis for the purchase. Marks, as noted, had already been informed by Taylor that he was selling his business and that the Cartersville facility would in all likelihood be available sometime in the near future. The Respondent had also by this time become frustrated by the pace of negotiations, as evident by the walkout of its negotiators from the March 7, meeting. Given these circumstances, I am convinced that the Respondent was contemplating purchasing the Cartersville facility as early as June.

b. The September 25–October 5 events

Marks testified that between September 25, and October 5, Director of Strategic Projects Jerry Owens, was assigned to assess the financial and logistical implications of moving Northumberland production to Cartersville, and of coming up with a proposal to present to Taylor for the purchase of the facility. She further testified that after some back and forth negotiations, she and Taylor reached a "handshake" agreement for the purchase and sale of the Cartersville plant, and that she thereafter scheduled a second management meeting for October 5, which was also attended by Attorney Mitchell. At this meeting, according to Marks, those present agreed to "continue to try to move forward to reach ultimate contract with Mr. Taylor. We would continue to try to work toward, see if he could move his business out in time for us to build trailers on a timely basis. This looks like an economically viable deal, let's see if we can reach final agreement" (Tr. 697). Marks claims that despite the "handshake" agreement, certain problems needed to be resolved before the deal could be finalized, including trying to get Taylor to complete his own work as quickly as possible so that Respondent could move in, and environmental and zoning issues, and that she personally was "probably primarily concerned" about environmental problems that might cause her to withdraw from the deal. Also causing her concern was the fact that Taylor needed to satisfy his own customers' demands which presumably might delay implementing the deal.

Marks claims that between September 25 and October 5, she met with Georgia government officials to inquire about economic incentives that might be available should Respondent decide to move, and received offers of assistance in the form of tax credits, employee training, and reduced utility costs, which made the move to Cartersville more attractive. Marks further expressed surprise and dismay that neither the State of Pennsylvania nor local county officials had offered to help Respondent stay in Pennsylvania. By the same token, however, nothing in Marks' testimony suggests that she went out of her way to solicit such assistance from Pennsylvania State or local officials as she did with the State of Georgia. An October 16 memo from Mitchell to McHugh makes clear that it was Respondent who solicited such incentives from the State of Georgia (Jt. Exh. 2). Without making similar inquiries from Pennsylvania

governmental officials, Marks could not have known if the latter had similar incentives to offer.

Gordy provided a slightly different version of the October 5 meeting. According to Gordy, a decision was made at that meeting to approach Taylor about purchasing his facility, and that if an agreement was reached, Respondent would then bargain with the Union about the effects of moving unit work from Northumberland to Cartersville, "and about the possibility of what would be the long term decision for that plant." Respondent further decided at that meeting that "the work that was currently being performed [at Northumberland] would be finished there; that any orders that had not been started would be taken to the Cartersville location," and that new orders arriving at Northumberland would also be sent to Cartersville (Tr. 577). Gordy was assigned responsibility at this meeting for starting up the Cartersville facility (Tr. 552–553). Gordy testified that the "handshake" agreement between Marks and Taylor occurred after this October 5 meeting. This, however, contradicts Mark's assertion that the "handshake" agreement took place prior to October 5 meeting. Gordy's last day of work at Northumberland was October 12, after which he moved to Cartersville to assist in the start up of the operation.[17]

On October 5, Marks notified her board of directors that she had reached agreement with Taylor to buy Cartersville, and of her intent to announce the agreement to all of Respondent's constituencies, including the Cartersville employees, on October 9 (Jt. Exh. 2). The record reflects that either on or before October 5, the Respondent had developed a detailed plan and timetable for the closure of Northumberland and the move to Cartersville, which identified some 28 tasks that were to be accomplished within a set timeframe for the successful completion of the move (G.C. Exh. 51). A copy of the plan was sent by Owens on October 5, to all senior and other management officials involved with the closing of Northumberland and/or purchase of Cartersville, including Sawyer, on October 5.[18]

6. The Union is notified of the Cartersville purchase and of the decision to relocate all unit work

On October 9, Sawyer phoned McHugh at home to advise him of the purchase and, unable to reach him, left the following message on his answering machine:

> This is Kenny Sawyer with Dorsey Trailers. Just calling you this morning to let you know we've made a decision. We have purchased another trailer manufacturing facility down in Georgia, and plan to move our Northumberland production down here within the next four to six weeks. I wanted to talk to you about bargaining over the decision itself, as well as the outcome of that decision. I'll be available during the day today, at [phone number], if you want to give me a call back, or [1–800 number], on voice mail, if you want to leave me a message where I can get in touch with you. But again, we've made the decision to move the production out of Northumberland. The company has purchased a plant and we plan on moving—moving that work out. In terms of the Northumberland facility, long-term, as far as what we're going to do, that's up in the air right now, but we're certainly open to bargaining with you and your committee over there. We'll make ourselves available to do so whenever you have some open time. All right, thank you. [G.C. Exh. Tr. 31.]

Sawyer was not being truthful when he denied in his phone message knowing what Respondent's plans were for the Northumberland facility, for Owens, as indicated, had earlier sent him a copy of Respondent's plan and timetable for the closure of the Northumberland facility. Sawyer has not denied knowing of or seeing the plan prior to October 9. Sawyer followed up his phone message with a confirmation letter informing McHugh that Respondent intended to begin production of both flatbed and dump trailers at Cartersville as soon as possible.[19] He further informed McHugh in his letter that Respondent was seriously considering closing the Northumberland plant, and that it stood ready to bargain with the Union "over both the effects of that decision and the decision itself" (Jt. Exh. 2, p. 29).

On receipt of Sawyer's phone message on October 9, McHugh phoned Sawyer to elicit more information about the decision to move production work to Cartersville, and was again told that that decision had been made. When McHugh asked what the Union might do to reverse that decision, Sawyer informed him that the decision was irreversible, that the Union could do nothing to prevent the relocation of unit work, but that the Company stood willing to discuss the long-term effects of the plant (Tr. 203–204). Sawyer did not deny having had this conversation with McHugh or mentioning that the relocation decision was irreversible.

On October 11, McHugh told Gordy he had received Sawyer's message and reiterated an earlier request made to Sawyer that the Union wanted to bargain over the decision and the effects of the transfer of unit work to Cartersville (G.C. Exh. 32). That same day, the Respondent issued a press release announcing its agreement with Bankhead for the purchase of the Cartersville facility at a price of $2 million, and its intent to begin the manufacture of flatbed and dump trailers at that location by December (G.C. Exh. 42).

7. The October–November sessions/events

a. October 13 session

On October 13, the parties met for the first time since the brief September 12 meeting. However, the Respondent's two principals during the previous sessions, Sawyer and Gordy, did not appear. The Respondent instead sent Attorney Mitchell and its vice president of administration, Paul Morrow, in their place. At the outset, Mitchell informed the Union that he and Morrow were replacing Sawyer and Gordy as the Company's negotiators, with himself as its chief spokesperson. Winnick was also in attendance. Mitchell informed McHugh of the Car-

[17] As the evidence herein supports a finding, which I have made below, that the decision to move to Cartersville had already been made by October 13, Gordy's and Respondent's claim that his relocation to Cartersville was only tentative is found to be without merit. The fact that Gordy did not move his family to Cartersville right away does not establish that Gordy's move was not permanent, for it is not an uncommon practice for an individual to relocate first before moving his or her family to the new location.

[18] In his memo, Owens advises against assuming from the schedule that a decision to close Northumberland had already been made. However, as more fully discussed below, the evidence supports a finding that such a decision had indeed been made. Thus, I am convinced that either Owens simply intended to cover up a decision already made, or had been kept in the dark regarding the true nature of the decision.

[19] The record reflects that production in Northumberland at the time was limited to flatbed trailers only, and that the manufacture of dump trailers was still being performed by Taylor at his Bankhead facility.

tersville purchase, and stated that Sawyer and Gordy were busy with their new duties opening up the new facility. He further advised that Respondent would be shifting production of both flatbed and dump trailers to Cartersville, and that work at Northumberland would cease by the end of October or the first week in November. Mitchell averred that Respondent had no need for two facilities, but would nevertheless bargain "over the effect and the reasons and we'll answer any questions." (G.C. Exh. 47; C.P. Exh. 5, p. 47). Mitchell then withdrew the Company's last offer from the bargaining table, claiming that changed circumstances rendered its offer inappropriate, and that discussion was needed to determine whether Respondent will continue to operate in Northumberland. Asked when the Cartersville was placed on the "selling block" and when discussions were initiated between Taylor and Respondent for the purchase and sale of the facility, Mitchell responded "3-½ weeks" ago, or approximately around September 19 or 20. However, at another point in the meeting, according to the Union's bargaining notes, Mitchell changed his earlier assessment by suggesting that negotiations between Marks and Taylor began "3 weeks" ago (G.C. Exh. 47).[20]

Mitchell also advised that the decision to buy the Cartersville facility and move production there was separate from the question of whether the Northumberland facility would remain opened, emphasizing that Northumberland's future was in the Union's hands, that if the Union could give Respondent a reason to keep the facility opened, it would be considered (G.C. Exh. 47). The Respondent's bargaining reflect that Mitchell told McHugh, "The decision has not been made yet and the decision to keep the plant open is up to you" (CP Exh. 5, p. 51). At the meeting, McHugh requested certain information in order to prepare proposals. Mitchell assured him that he would have the information before the next agreed-upon session of October 19. The duration of this first meeting is not made clear in the record.

b. The offer to return to work

On Monday, October 16, the Union, on behalf of strikers, made an unconditional offer to return to work, the receipt of which was acknowledged by Morrow (G.C. Exh. 30). For reasons unexplained in this record, the Respondent chose not to respond to the Union's offer until 3 days later, e.g., during the next bargaining session held on Thursday, October 19.

c. The October 19 session

This session began with McHugh stating it had no proposals to offer as he had just received the information requested on October 13, just 2 hours earlier. Discussion then turned to the employees' October 16 offer to return to work. Mitchell stated that Respondent would begin discharging temporary employees and reinstating strikers the following week, and could not do so sooner because of Respondent's contractual arrangement with Worldwide Labor, which he claimed required Respondent to provide the temporary employees with 1 week's advance notice of the cancellation. Mitchell offered to recall strikers according to seniority, provided they had the necessary skills, and offered to grant Attinger superseniority recall rights. He asserted, however, that not all strikers would be returned because the cancellation of orders had reduced the amount of work that was available, and that those not returned would be deemed laid off (C.P. Exh. 5, p. 52; G.C. Exh. 47, 10/19 notes). Following a caucus, McHugh responded that he would go along with the superseniority proposal for Attinger, and questioned Respondent's decision to retain the temporary workers for several more days.

Mitchell then gave the Union a 60-day notice of plant closure pursuant to the Worker Adjustment and Retraining Notification (WARN) Act of 1988 (29 U.S.C. §2101, et. seq.), stating the notice was conditional because Respondent had not yet decided what to do with the Northumberland facility. Mitchell stated his belief that Respondent was not required to give the Union such a 60-day notice, but was doing so out of an excess of caution (G.C. Exh. 34).[21]

Mitchell explained that the only reason the Northumberland closing was on the table was because of the Cartersville purchase, and that given the tax breaks Respondent was receiving from the State of Georgia, the lower cost of living which translated into lower salaries, and the lower freight costs, any agreement reached by the parties regarding Northumberland would have to be as economically attractive as the Cartersville deal. He further pointed out that while the terms of its last offer had at one time been acceptable to Respondent, it no longer sufficed as an inducement for Respondent to remain in Northumberland, and that any package proposed by the Union had to

[20] The Company's notes only show Mitchell stating that the Cartersville facility was put up for sale "about 3-½ weeks ago," but do not contain his further statement that Respondent began negotiating for the purchase at about the same time. Although the Union's notes show Mitchell vacillating somewhat regarding the timing of the start of the Cartersville negotiations, Mitchell's claim that said negotiations began around September 19 or 20, e.g., 3-½ weeks earlier, is accepted as accurate.

[21] Jean Neitz, a nonunit employee, who worked as a receptionist for Winnick, testified she received a 60-day WARN notice in mid-September on her return from vacation, and that she was familiar with such notices because she had gone through a similar closing with a prior employer. Her testimony that her last day of work was November 16 or 17, and that she received a full 60-day notice of the closing, coincides with her claim that she was given the WARN notice in mid-September. The Respondent at the hearing offered little opposition to Neitz' testimony, and its posthearing brief is silent on the issue. The only "challenge," if it can be called that, to Neitz' claim came from Mitchell who claimed to have no explanation for why Neitz would have received a 60-day WARN notice in mid-September. Rather, appearing somewhat bewildered, Mitchell admitted he was involved in the preparation but not the mailing of the WARN notices to nonunit employees, but testified both unit and nonunit employees were issued notices at the same time, which presumably would have been October 19, when unit employees were given notice through the Union (Tr. 664–666). However, Mitchell's oral testimony, that the Union and nonunit employees were simultaneously issued 60-day WARN notices, conflicts with his own prior statement to the Union at the October 26, bargaining session that Respondent "gave a notice to the nonbargaining unit people first" (C.P. Exh. 5). Overall, Mitchell's attempt to refute Neitz' testimony that she received a 60-day notice of closing in mid-September was unconvincing and simply not credible. Unlike Mitchell, Neitz was a disinterested witness, rendering her testimony more reliable. Further, the Respondent could easily have proven Neitz wrong by producing a copy of the WARN notice issued to her, or to other nonunit employees, reflecting the date of issuance, just as it did with the WARN notice served on the Union on October 19. The Respondent did not do so, and has made no claim that such notices were not readily available for production, leading me to believe that the Respondent chose not to produce a copy of the WARN notice issued to Neitz and other nonunit employees because they would not have supported its case. *MK Railway Corp.*, 319 NLRB 337, 342 (1995). Accordingly, I credit Neitz and find that she, and in all likelihood all other nonunit employees, was given a 60-day WARN notice of plant closure in mid-September.

be real attractive and contain serious concessions. Mitchell warned that unless the Union returned with a serious concessionary proposal in the near future, "we'll not be able to operate in Northumberland."

The parties' bargaining notes reflect that McHugh at one point asked Mitchell for direction on what Respondent expected in terms of concessions. Mitchell, however, responded that he had no proposals of his own to present, but that Respondent was looking for reductions in salaries and benefits, mandatory overtime, and a free hand in running the business. Mitchell was not being truthful in claiming he had no company proposals to present that day, for Respondent's own bargaining notes make clear that Mitchell had with him, but chose not to turn over, a company proposal identifying in "bullet point" fashion some 31 concessions that Respondent felt were needed for it to remain in Northumberland (G.C. Exh. 36).[22]

Mitchell and McHugh disagree on whether the latter received a copy of the "bullet points" proposal on October 19. Mitchell, for example, claims that during an off-the-record discussion held away from the bargaining table that same day, he handed McHugh a copy of the proposal and offered to distribute copies to other members of the union bargaining team. However, according to Mitchell, McHugh "suggested that that would not be the appropriate thing to do" and that as a result, the proposal was not circulated to the others. Mitchell nevertheless claims that he "verbalized" the "bullet points" and read the proposal aloud to the union committee, thereby making it clear to the union committee "what we were looking for" (Tr. 651).

McHugh admits that on October 19, Mitchell told him he had a proposal, but claims it was mentioned to him *after* the meeting, that Mitchell asked when would be the best time to present it, and that he told Mitchell to present it at the next meeting. He expressly denied being given a copy of the "bullet points" (Tr. 307). McHugh seemed to recall that during the October 19 meeting Mitchell may have mentioned something about having a proposal to offer the Union, but did not recall any discussion by Mitchell of the "bullet points" proposal. McHugh was obviously mistaken about hearing Mitchell make mention of a proposal during the October 19 meeting, for the bargaining notes make clear that Mitchell informed the Union he had no proposal to offer that day. Respondent's bargaining notes, for example, show Mitchell stating: "*We don't have a proposal either*" (C.P. Exh. 5, p. 53), while the Union's notes similarly show Mitchell remarking, "I have no proposals prepared for you at this time" (G.C. Exh. 47).

As between Mitchell and McHugh, I credit the latter and find that McHugh was not given a copy of the "bullet points" proposal on October 19. Rather, I find that Mitchell was first told of the proposal and possibly some of its contents after the October 19 meeting had ended, and that the proposal was not presented to the Union until the start of the next bargaining session on October 26. A notation in the upper right-hand corner of the "bullet points" proposal given the Union, reading, "Received 10/26/95 from Company," supports McHugh's testimony as to when the Union received the proposal (G.C. Exh. 36). Nor do I find credible Mitchell's assertion that he read and verbalized each "bullet point" at the October 19 session, for not only did he express to the Union that day that he had no proposals to present, nothing in the Union's or Respondent's bargaining notes, or for that matter the suspect "Morrow" notes, even remotely suggests that any such recitation or discussion of the "bullet points" proposal by Mitchell took place that day.

Finally, the bargaining notes of that meeting show, and Mitchell readily admits, that he sought to steer the Union into effects bargaining, despite the fact that the parties had thus far held only one meeting to discuss the relocation and plant closing decision, and that no proposals had even been exchanged (Tr. 669). The meeting ended with Mitchell agreeing to provide the Union with certain information, and reminding the Union that Northumberland could not remain open without serious concessions, and that the matter of the closing was "pretty much" up to the Union. This meeting, as noted, produced no exchange of proposals or any bargaining on the plant closing issue, and lasted a total of 4 hours (G.C. Exh. 47).

d. The October 26 session

At the start of this meeting, McHugh informed Mitchell that having just received a copy of the "bullet points" proposal, he was unprepared to respond with any counterproposals. He did, however, submit a concessionary proposal on mandatory overtime which Mitchell summarily rejected, describing it as "water under the bridge" and stating it would have been nice if McHugh had presented it sooner. Mitchell expressed a willingness to give McHugh a reasonably short but unspecified period of time in which to respond to the "bullet points," but cautioned that the clock was ticking on the 60-day WARN notice, that Respondent could establish whatever wages and benefits it wanted to at the Cartersville facility and had good economic reasons for closing Northumberland, and that the Union had to come up with a proposal that would convince the Respondent to want to stay in Northumberland. Mitchell then informed McHugh that by 4:30 p.m. that afternoon, all temporary workers would be gone and that Respondent could, in all likelihood, reinstate some 16 strikers during the weekend, but that this was subject to change. As to the total number of employees that might be reinstated, Mitchell estimated that to be some 30 employees, more or less.

Prior to adjourning, the parties discussed when they would next meet. McHugh pointed out that on Monday, October 30, the Union would be holding a membership meeting to draft proposals. Mitchell responded that he would be willing to meet "anytime, day, night, holiday" but then qualified his response by stating he would prefer not to meet on either the following Thursday, November 2, or Friday, November 3, but could meet on Tuesday, October 31, or Wednesday, November 1.

Despite an exchange of proposals, the bargaining notes make clear that except for the Union's mandatory overtime proposal which Mitchell rejected, no substantive discussion took place on the Respondent's proposal or on the plant closing issue in general. The entire meeting lasted less than 2-½ hours (G.C. Exh. 47).

e. The post-October 26 correspondence between the parties

By letter dated October 27, Mitchell expressed to McHugh the need to move the bargaining process forward "as quickly and expeditiously as possible" (Jt. Exh.1). He further notes that despite knowing of the potential closing of Northumberland since October 9, the Union has submitted only one proposal on

[22] The concessions sought included, inter alia, a 5-year contract, a 20% across-the-board pay cut with a freeze on wage increases for the life of the contract, reductions in the number of paid holidays from eleven to eight, substantial cuts in the amount of vacation time employees could accrue, and changes in group medical insurance plan including an increase in the co-pay for employees.

mandatory overtime during the 3-week period, and that that proposal was rejected because it was "too little, too late." Regarding the "bullet points" proposal, Mitchell states that the Union should be prepared to address each "bullet point" at the next session, noting that while he understands many union members might not be willing to continue working under the conditions set forth in the "bullet points," the reality is that this is what it would take for the Respondent to keep Northumberland opened.

It appears that Mitchell and McHugh conversed soon after October 27, for on October 31, Mitchell wrote to confirm said conversation. In his October 31 letter, Mitchell tells McHugh that Respondent needs to make a decision immediately on the Northumberland closure with or without the Union's input, and suggests the Union was aware as early as September that the plant might close. The letter faults the Union for having scheduled only three meetings, and that except for the mandatory overtime proposal submitted on October 26, the Union had thus far failed to produce a comprehensive proposal. Mitchell then suggests that the parties move into "effects" bargaining, unless the Union was prepared to come to the next meeting with a full, complete, and comprehensive written proposal addressing each of the items in the "bullet points" proposal. Mitchell further advises that Respondent would be justified by the Union's delay in closing the plant without any further discussion, except with respect to "effects" bargaining. He concludes by stating that Respondent intended to make a final decision regarding the plant closure on November 4, that the Union should submit any proposal it wished to have considered prior to that date, and that in the absence of any such proposal, the Respondent would proceed to make its decision to close without such union input (G.C. Exh. 38).

In a November 4 response, McHugh denies Mitchell's assertion that the Union was notified "as early as September" of a possible plant closing, noting that company documents provided to it show that discussions regarding the purchase of Cartersville did not even begin until late September. McHugh also denies that the Union is engaging in bad-faith bargaining, stating that it was Respondent who was sending out mixed messages as to what it intended to do at Northumberland. He noted, for example, that while claiming to be interested in continuing negotiations with the Union towards a new Northumberland agreement, the Respondent had continued to aver that all Northumberland production was to be transferred to the Cartersville facility. Given these circumstances, McHugh queried Mitchell as to what would remain at Northumberland for unit employees to do, and what if anything any such agreement would cover. McHugh points out that in order for the Union to intelligently bargain over anything other than the effects of the Northumberland closing, the Union would need to know what work was to be performed at the plant should an agreement could be reached. McHugh faults the Respondent for failing to provide it with this information and states that, under these circumstances, Mitchell's assertion that the Union had delayed the bargaining process was simply incorrect. Finally, McHugh accuses Respondent of engaging in a ruse by publicly proclaiming its desire to bargain with the Union over the decision to close when it was fairly obvious the decision to close was made before Respondent offered to bargain. The letter advises Mitchell that the Union was prepared to immediately begin bargaining over the effects of the plant closure, but that in doing so it was not waiving its right to assert that the Respondent did not bargain in good faith over its decision to close Northumberland, nor waiving its right to claim that the closing of the plant and the transfer of work to the Cartersville, facility was unlawful (G.C. Exh. 39).

f. The November 6 session

The parties met one last time on November 6, for approximately 2-½ hours (R. Exh. 28; G.C. Exh. 47). The following summary of the meeting is derived for the most part from the Union's bargaining notes (G.C. Exh. 47) for, as noted, Respondent's "official" notes, do not include notes for November 6 (C.P. Exh. 5), and while the "Morrow" notes do, they are not, as found above, reliable. Mitchell informed McHugh at the start of meeting that Respondent had planned to make a decision to close over the weekend, but put off its decision to see if the Union would present it with a counterproposal in line with the "bullet points" proposal. Respondent's intent, according to Mitchell, was to close Northumberland and move to Cartersville, and that unless the Union was ready to offer counterproposals, they should move on to "effects" bargaining. McHugh responded that he was prepared to respond and thereafter went down the list of "bullet points" pointing out which were acceptable and which the Union could accept with modifications, and rejecting those inconsistent with the prestrike interim agreements reached by the parties. On economic concessions sought by Respondent in its "bullet points" proposal, including a "20% across-the-board pay cut with a freeze on wages for the life of the contract," McHugh expressed a willingness to grant the concessions if the Respondent would agree to open its books to justify the reductions sought.

After McHugh had responded to Respondent's proposal, Mitchell complained that McHugh had not presented any concrete proposals of his own and insisted the Union needed to articulate a specific proposal for the Company to consider. He also declined to open Respondent's books for inspection claiming the Respondent was not pleading poverty. Despite his above comments, Mitchell left the door open for further discussions when after listening to the counterproposals he told McHugh that he had "given us a lot to think about" and was entitled to a response, and that while he was not prepared to respond to anything at that point in time, he promised to study the Union's counterproposals and provide McHugh with a response at some future date (Tr. 658, 674; R. Exh. 28).

After advising McHugh that he was not prepared to respond to the Union's counterproposals, Mitchell suggested they make use of the remaining time allotted that day for negotiation by turning to effects bargaining, which McHugh agreed to do. Despite requesting "effects" bargaining, Mitchell admitted he had no proposal to offer and was instead expecting one from the Union. Following a caucus, McHugh stated he needed additional information on employee entitlements under the pension plan in order to prepare "effects" bargaining proposals. When McHugh asked what Respondent intended to do with the pension plan, Mitchell indicated he was not prepared to answer that particular question. Although McHugh had not developed any "effects" proposal, he did provide Mitchell with items he would like included in the employees' severance package. The meeting, which lasted only 2½-hours (G.C. Exh. 47; R. Exh. 28), ended with Mitchell stating the Company would review and get back to the Union on its counterproposals. The "Morrow" notes indicate that it was Mitchell who ended the meeting by telling McHugh, "Bob, I think we should call it a day" and

that he "did not have anything to say but we would be in touch" (R. Exh. 28, 21–22).

Although no specific date was set for the next meeting, Mitchell's own testimony along with the "Morrow" notes, make clear that the parties expected to meet again. Thus, Mitchell testified that at the end of the meeting, he and McHugh discussed dates for the next meeting and that, while no actual date was set, both agreed to correspond with each other after checking their respective calendars to see when they could meet again (Tr. 658). The "Morrow" notes likewise reflect that Mitchell asked McHugh, "We need to decide when we are going to get together next." Although Mitchell told McHugh he might not be present at the next bargaining session, his reference to another meeting, e.g., "the next time there is a bargaining session," provides irrefutable evidence that Mitchell anticipated holding further meetings.

8. The post-November 6 events

By letter dated November 9, Mitchell notified McHugh that the Union's counterproposals had been carefully considered and that while some were found acceptable, others were not. The letter, however, did not specify which of the Union's proposals the Respondent found agreeable, and which it did not. Mitchell went on to say that Respondent simply had no more time to spend in "protracted negotiations on these issues," and that the "Company's decision to close Northumberland must now be considered final." As to when the closing would occur, Mitchell advised that it "may be within a period as short as a few weeks" and that the Union would be notified of the exact date of closure. Mitchell further presented McHugh with certain "effects" bargaining proposals. On receiving no response, Mitchell sent McHugh another letter soliciting a reply to his "effects" proposal. On November 20, Morrow forwarded to the Union the retirement information requested by the latter at the November 6 meeting (Jt. Exh.2). The Northumberland facility was thereafter closed, although the record does not make clear exactly when this occurred. The Respondent on brief proffers a stipulation that the closure and termination of all unit employees occurred on December 29. While I find that the facility did close, I make no finding on exactly when that event occurred and leave that question to be resolved at the compliance stage of the proceeding.

C. Discussion and Findings

1. Interference with employee rights

a. Brian Wheary-Todd Duttry incident

Brian Wheary was employed by Respondent for a little over 2 years prior to the hearing, and was supervised by Todd Duttry. He testified to having a conversation with Duttry a few months before the strike regarding a grievance he had filed over having been reassigned from his painter position to the position of laborer, and having to perform such chores as cleaning trailers, screwing down floors, etc. Wheary claims that during this conversation, Duttry asked him about the grievance and instructed him to bring any future grievances to him first for discussion before going to the Union, and that Duttry would decide if the matter was "suitable enough" for Wheary to take to the Union. Duttry, Wheary further claims, told him he was not permitted to talk to the Union unless Duttry first gave him permission, and that if he wanted to talk to the Union he would have to do so before or after work (Tr. 452; 459).

Duttry admits having a conversation with Wheary involving the former's leaving his work station to see a shop steward.[23] He testified that Wheary had "more or less" left his work area for "a period of time" and when he returned, he simply told Wheary that "if he wanted to go to a shop steward or something like that, that he was to leave [sic] me know first" and "we would schedule a time or whatever for him to go to the shop steward." Duttry claims that "was pretty much the end of the conversation." He also testified that his particular practice regarding employees leaving their work station was that employees "should leave [sic] me know prior to leaving the work area for any amount of time, considerable amount of time." It is fairly apparent, and the Respondent does not claim otherwise, that there was no written rule requiring employees to seek permission from or to consult with their supervisor before leaving their work station to meet with a union steward. In this regard, Duttry testified only that there was an unwritten rule at the plant that employees should inform him, but simply as a matter of courtesy, when they expected to be gone from their work area for a "considerable amount of time," and that while employees often failed to do so they were never disciplined for it (Tr. 479, 482). No explanation was proffered as to what constituted a "considerable amount of time."

As between Wheary and Duttry, I credit the former. While Wheary had difficulty recalling exactly when the conversation occurred, given the passage of time his failure to do so was not particularly unusual and indeed understandable. Duttry apparently suffered from the same infirmity, for his recollection was that the conversation occurred sometime in the spring prior to the strike. Despite an occasional rambling, which I took as a simple case of nerves associated with testifying, Wheary impressed me as being more reliable than Duttry, and moreover provided greater detail on this incident than did Duttry. From a demeanor standpoint, I found Wheary to be the more credible of the two, testifying, in my view, in a straightforward and honest manner. By contrast, Duttry seemed less sure of himself and was at times vague, as when he testified that Wheary had "more or less" left his work station for some unspecified period of time. There were other problem areas in his testimony which cast doubt on his version of the above incident. His claim, for example, that Gordy never discussed the status of the negotiations during weekly meetings with salaried employees was contradicted by Gordy himself, who readily admitted that such discussions occurred often, and by Keith Bingaman, a former supervisor, who testified he heard Gordy engage in such discussions during supervisory meetings (Tr. 481; 506, 124). Having credited Wheary, I find that Duttry directed Wheary to bring any grievance to him so that he could make the determination whether it should be brought to the Union, and further instructed Wheary not to talk to the Union without his permission, or else to do so only before or after work.[24]

Requiring an employee to bring a potential grievance to a supervisor for his or her review and approval amounts to a clear interference with the employee's Section 7 right of access to his

[23] The Respondent claims in its posthearing brief that Gordy "alerted Duttry's attention to Wheary's absence" from his work station (R. Br. 50). Duttry makes no mention of this in his testimony, and a search of the record failed to reveal any support for the Respondent's claim.

[24] Although the General Counsel claims that Duttry did not deny Wheary's assertions, Duttry's claim that his version of what was discussed is pretty much all that was said is tantamount to a denial of Wheary's claims.

or her chosen representative, and has a chilling and coercive effect as employees would understandably be reluctant to discuss with a supervisor any problems they may have with management or supervision in general. *Southern California Gas Co.*, 251 NLRB 922 (1980). Duttry's directive to Wheary is therefore found to be violative of Section 8(a)(1) of the Act. Likewise, Duttry's requirement that Wheary obtain permission from him before talking to the Union, or to talk to the Union before or after work also violates Section 8(a)(1). The Respondent, as noted, does not assert, nor has it shown, that it had a rule or policy prohibiting contact between employees and the Union during normal working hours. Indeed, Respondent's only defense to this particular allegation is that Duttry should be credited over Wheary, a claim I have rejected.

b. Ed Woodland-Barry Endy incident

Ed Woodland worked as an assembler for Respondent from 1991 to June 1995. He testified that in early 1995, he requested of his supervisor, Barry Endy, that assemblers be rotated every so often because while he and other employees, such as Richard Van Buskirk, spent most of their work hours doing very strenuous work, other assemblers were performing lighter duties. Endy, according Woodland, became upset and informed Woodland he had never before had to rotate employees. Woodland then filed a grievance which he claims angered Endy so that the latter threw a broom in the direction where he and others were busy working. Woodland proceeded to file another grievance with Attinger over this incident. A few days later, according to Woodland, Endy told him and Van Buskirk, "If you have any more problems, you don't have to go to the Union. You can come to me, that's what I want you to do. You don't have to go running to the Union every time you have a problem. We can handle this" (Tr. 155).

Predictably, Endy had a different version of events. He testified that in June, he noticed Woodland and Van Buskirk talking to Attinger, that a short while later Attinger left, and that soon thereafter Larry Arnold, Endy's superior, told him Attinger had spoken with Gordy about Woodland and Van Buskirk wanting to rotate jobs. Endy claims he simply stated, "That's fine," and then told Woodland, Van Buskirk, and two other members of the assembler team they could rotate jobs or do whatever they wanted so long as the job got done. Endy concedes, however, that soon thereafter, as Woodland and Van Buskirk were heading towards a new trailer project, he told Woodland, "What you need to do is come to me if you have a problem. If you don't have a problem, that's fine, but if you have a problem, I don't know you have a problem unless you come and talk to me about it, and then we'll go from there." He further denied ever throwing a broom at any employee.

Endy, like Duttry above, stated he was merely seeking to have employees grant him the courtesy of bringing their "problems" to him first, and that his intent was solely to instill in employees a sense of confidence that he could help them out. I credit Woodland's version of the incident and find that Endy was seeking to circumvent the Union by having Woodland and Van Buskirk bring their grievances to him rather than the Union, and promising implicitly to resolve them. In so doing, the Respondent, I find, further violated Section 8(a)(1) of the Act.

c. Threats by Supervisor Keith Reader

The complaint alleges that admitted 2(11) Supervisor Keith Reader: (1) threatened employees with plant closure if the parties were unable to reach agreement on a successor contract; (2) created an impression of surveillance by telling an employee he knew what the employee had said at a union meeting because he had people at the meeting who reported to him, and threatened the employee with unspecified reprisals because of his union sympathies; and (3) threatened that Respondent would close the plant if employees voted to strike (G.C. Exh. 1[r], pars. 6 a–c).

In support of the above allegations, the General Counsel called employees Theresa Goguts, Yvette Derr, and Henry Maneval. Goguts testified that in late February or early March, Reader told her, "Terri, Marks will close it down, she has no time to waste on you people negotiating a contract" (Tr. 440). Derr testified that on the last day of work before the strike, as she was putting her tools away, Reader approached her and said, "If you guys go out on strike, you won't be coming back to work." Derr claims she agreed with Reader regarding the likelihood of returning to work. As noted earlier, Derr went out on strike but returned to work on August 28. She claims Reader mentioned to her during the first 3 days back to work that if more people did not cross the picket line, there wouldn't be any jobs, and stated at one point that Respondent had either purchased or was in the process of purchasing a plant in Georgia (Tr. 378–380).

Maneval testified that he attended one of the union meetings during which McHugh asked employees if they had overheard any comments about the closing of the plant, and that he raised his hand indicating he had. Soon thereafter, Reader told Maneval, "I know what you said at that Union meeting, I have people there, I know what's going on, don't try to cross me" (Tr. 401). Maneval further testified that sometime in February, as he, Derr, and another employee, Kelly Shade, were putting away their tools and engaged in small talk, Reader approached and told them, "Youse people vote to go out on strike, Marilyn [Marks] said she will close the plant down, and that's not a threat, it's a promise, but you didn't hear it from me" (Tr. 399).

Reader was called as witness by the General Counsel and, while also on Respondent's list of witnesses, was not recalled by the latter during presentation of its case-in-chief to refute or challenge the statements attributed to him by Goguts, Derr, and Maneval, all of whom testified after Reader had done so.[25] The Respondent did elicit from Reader a conclusory denial of complaint paragraph 6(b), the allegation pertaining to Maneval, before the General Counsel had even presented evidence in support of the allegation. Thus, without knowing who or what the General Counsel would produce in support of paragraph 6(b), the Respondent got Reader to generally deny having ever told an employee that he knew of the employee's attendance at a union meeting because he had people at the meeting who reported to him on the employee (Tr. 144). Apparently satis-

[25] Following questioning by the General Counsel and the Union, the Respondent cross-examined Reader and, following such examination, was allowed without objection to question Reader on other matters not covered in his direct examination. Respondent's counsel indicated that while he might recall Reader to testify, he did not want to unnecessarily interrupt Reader's employment by recalling him during the Respondent's presentation of its case. Following his testimony, Reader was informed that he was subject to being recalled by Respondent's counsel. Respondent's counsel advised Reader that they would be willing to accommodate any flexibility in his schedule, but that it might not be necessary. In fact, the Respondent never recalled Reader to specifically refute any of the above testimony elicited by the General Counsel following Reader's testimony.

fied that Reader's general denial would carry the day, the Respondent chose not to recall him to specifically refute Maneval's subsequent and more specific testimony given in support of paragraph 6(b).

Reader's conclusory denial of the specific complaint allegation appears totally contrived and is wholly unbelievable. Thus, although he could not have known the facts underlying the allegation that he threatened an employee with "unspecified reprisals" because of the employee's union activity, Reader somewhat incredibly claimed he knew what the allegation was all about, and proceeded to provide an explanation for the alleged conduct. His testimony in this regard is rejected as too conclusory to be entitled to any weight. *Hargis Mine Supply, Inc.*, 225 NLRB 660, 663 (1976).

In summary, I credit the uncontroverted accounts of Goguts, Derr, and Maneval as to what Reader told them. As to the legality of Reader's remarks, under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), statements about plant closings and job loss, such as those directed at the above employees by Reader, are deemed to be threats if the predictions are not carefully phrased on the basis of objective fact conveying the employer's belief as to demonstrably probable consequences beyond its control. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). Reader's comments were obviously not couched in such terms.

The Respondent, however, contends that Reader was a low-level supervisor who could not have been speaking on its behalf when he made his isolated remarks. It further argues that the effect of Reader's remarks on employees was de minimis. I disagree. Reader's own testimony establishes that he was acting at the behest of upper management when he made his threatening remarks. Thus, he testified that he held weekly meetings with the 60–65 employees under his supervision and that during those meetings he told employees that the plant would close if they went on strike. He explained that he made the statements because at a management meeting held in February, Gordy told supervisors that "if [employees] go on strike, the place will close and I don't care if that goes on the floor," implicitly encouraging supervisors to disseminate his plant closing message to rank-and-file employees. Reader's testimony as to what Gordy told supervisors was corroborated by Supervisor Keith Bingaman, who also recalled Gordy mentioning at one such management meeting that if employees went on strike, the plant would close, and instructing supervisors to make sure his message got out to employees on the work floor (Tr. 124). He further testified that he conveyed this message to employees in response to their questions.

Gordy was evasive in his attempt to refute the above testimony that he told supervisors the plant would close if employees struck. Asked by Respondent's counsel if he ever made such remarks, Gordy responded, "Not as far as directly to anyone. I talked to them in generalities as we have discussed about both, you know, talking about the strikes, talking about the closing, but you know, each time, again, my direction has been to that group you know, leave that to the negotiating team and that you can't make any threats to anyone." Gordy admitted he may have told supervisors he did not object if certain things got out to the floor, but denied ever instructing them to tell employees that the plant would close if they went out on strike (Tr. 507). I reject Gordy's denial as evasive and purely self-serving. He did not outrightly deny making the remark that the plant would close if employees struck, and simply danced around the question by suggesting he never made it "directly to anyone." This, of course, is what both Reader and Bingaman claim, to wit, that Gordy made the remark to a group of supervisors and inferentially not to anyone in particular. Moreover, his denial about directing supervisors to take his plant closing message to employees is directly contradicted by Respondent's own Supervisors Bingaman and Reader, whose testimony constitute admissions against interest and entitled to greater weight over Gordy's self-serving denials.

In sum, it is patently clear that Reader was acting on behalf of Plant Manager Gordy, and speaking for Respondent, when he threatened Goguts, Derr, and Maneval with plant closure and unspecified reprisals. Moreover, by his admission, Reader did not limit his plant closing remarks to just these three individuals but, as noted, directed his remarks to a gathering of some 60–65 employees. In these circumstances, his threats were neither isolated nor de minimis. Respondent's further suggestion, based on Reader's testimony, that the latter's remarks were merely expressions of his own personal opinion is clearly without merit. Thus, despite claiming he made such a disclaimer to the employees, neither Goguts, Derr, nor Maneval testified to being told by Reader that he was not speaking on behalf of management and was only expressing his own personal views. Although Derr did mention that she believed Reader may have been expressing his own views, her thoughts in this regard were not based on anything Reader said to her, for she went on to admit that she did not know for sure if Reader was conveying his own views or expressing an official management position that the plant would close if employees went on strike (Tr. 388). In any event, the fact that Derr may have believed Reader was simply stating his opinion does not render the latter's plant closing threats any less coercive, for in determining if such statements constitute interference, restraint, or coercion, the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or on the success or failure of the such coercion. *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995); *Miami Systems Corp.*, 320 NLRB 71 fn. 4 (1995).

In light of the all of the above, I find that Reader, acting on behalf of the Respondent, violated Section 8(a)(1) of the Act by telling Goguts that Marks would close the plant because she has no time to waste negotiating an agreement, telling Derr that if she and others went out on strike they would not be returning to work, by creating the impression that Maneval's union activity was being kept under surveillance and threatening him with unspecified reprisals, and by telling Maneval and other employees that Marks would close the plant if they struck.

d. Endy's threats to Maneval and Goguts

Maneval testified that sometime in February, he arrived a little late to work after returning from the Geisinger Medical Center with his wife, that he then went into the Respondent's restroom facility, and that soon thereafter Endy entered the restroom and stated to him, "You know, if you vote to go out on strike, she's going to close this place down." Maneval claims he simply laughed and paid no mind to the remark believing this was simply a ploy by the Respondent to scare the work force (Tr. 400; 408). Endy, as noted, testified in this proceeding, and while questioned on other matters was not asked to confirm or deny Maneval's assertion in this regard. Accordingly, Maneval's claim in this regard is undisputed and is found to be credible.

Goguts likewise testified that around the same time Reader threatened her with plant closure, Endy stated to her, "What's the matter with you, can't you see what they're offering you is good, you are going to make us all lose our jobs" (Tr. 440). She testified that these types of remarks were repeatedly being made.

Although Endy's above remarks to Maneval and Goguts were not alleged as violations in the consolidated complaint, "it is well-settled the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995), quoting from *Permament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). As found above, threats of plant closure and job loss similar to those directed at Maneval and Goguts by Endy were also made by Reader towards those two employees, as well as to employee Derr. Further, while fully aware of Maneval's above assertion regarding Endy, the Respondent did not attempt to elicit a denial from Endy, opting instead to address only those statements attributed to Endy by Woodland and Goguts. Finally, the Respondent in its posthearing brief (p. 62) claimed that Endy's remark was not unlawful on grounds that Maneval did not feel coerced by any remark Endy may have made, and did not raise the lack of a complaint allegation as a defense. In these circumstances, I find that these issues are closely related to the subject matter of the complaint and have been fully litigated. *Hi-Tech Cable*, supra. I further find that Endy's remark to Maneval amounted to a threat of plant closure and violated Section 8(a)(1) of the Act. That Maneval may not have personally felt threatened by Endy's plant closing remark is of no consequence for, as previously stated, the determination of whether such a remark is unlawful does not depend on the successful effect of the coercion. *Miami Systems Corp.*, supra; *MK Railway*, supra.

e. Derr's withdrawal from the Union

On August 28, Derr, as previously noted, abandoned the strike and returned to work. The record reflects that about 1 week prior to August 28, Derr had become interested in returning to work and, not knowing how to go about doing so, asked Gordy for advice. Gordy was uncertain of what she had to do, and stated he would check with the corporate attorneys and get back to her. A day or two later, Gordy called her back and said she would have to resign before crossing the picket line and returning to work. Derr apparently told Gordy she did not know how to resign, at which point Gordy said he would have his attorneys prepare a letter of resignation for her, that she would then have to sign the letter and send copies to Attinger and McHugh (Tr. 377). Derr testified that Gordy told her it was strictly her decision to make, and made no effort to encourage or discourage her from resigning. Derr was in fact provided with the letter which she signed forwarded to the Union (G.C. Exh. 14). She recalled having had a conversation with someone on the subject of union discipline and fines that could be levied against her by the Union, but was unable to recall if this was something she had discussed with Gordy, although she expressly denied that Gordy made mention of this during her inquiry about resigning from the Union. Derr claims that she was left with the impression when she solicited help from Gordy that "the only legal way to protect everybody, myself and the company, the only legal way that I could come back to work was by resignation" (Tr. 382).

Gordy agrees that Derr called him to inquire about resigning from the Union. He claims Derr stated she had been against the strike from the start, that she was beginning to hurt financially, and needed to return to work. Derr purportedly expressed to him concerns she had about threats, intimidation, and physical harm that might come to her if she were to return to work. Gordy claims he informed Derr that the Union had a right to discipline its members, and that if she crossed the picket line while still a union member, she was subject to union discipline. He then agreed to check with Respondent's attorneys to see what remedies might be available to her, but advised her the decision was hers to make and that he could not guarantee anything. He admits that company attorneys prepared the letter of resignation for Derr because she did not know exactly how to resign (Tr. 76–77).

While not alleged as a violation in the complaint, the General Counsel nevertheless contends that Gordy's conduct in helping Derr resign from the Union amounted to interference with Derr's Section 7 rights and violated Section 8(a)(1) of the Act. I disagree. It is well settled that an employer may provide employees with information on how to resign or withdraw from a union "as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." *Manhattan Hospital*, 280 NLRB 113, 114 (1986), quoting from *R. L. White*, 262 NLRB 575, 576 (1982). Here, it was Derr who approached Gordy and asked for information on how to resign and, as Derr readily admits, Gordy at all times remained neutral neither encouraging or discouraging her to resign. The fact that the resignation letter was prepared by Respondent's does not, without more, render Respondent's conduct unlawful. *Mosher Steel Co.*, 220 NLRB 336, 337 (1975); also see *Peoples Gas System*, 275 NLRB 505, 507–508 (1985). On these facts, I find no basis for concluding that the assistance provided to Derr by Gordy violated Section 8(a)(1) of the Act.

2. The unilateral change in attendance policy

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new attendance policy on February 1. The Respondent does not dispute, rightfully so in my view, that the attendance policy is a mandatory subject of bargaining,[26] and concedes it did not bargain with the Union regarding the change (G.C. Exh. 1[t]; R. Br. 42). It defends its actions, however, by claiming it was authorized under the management rights clause and by past practice to make such unilateral changes in its employee work rules. Essentially, the Respondent's argument boils down to a claim that the Union waived its right to bargain over the changes made in the attendance policy. I disagree.

[26] Mandatory bargaining subjects are those encompassed in the phrase "wages, hours, and other terms and conditions of employment" as set forth in Sec. 8(d) of the Act. An employer's attendance policy has long been held to be mandatory subject of bargaining. *Pirelli Cable Corp.*, 323 NLRB 1009 (1997); *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996); *Treanor Moving & Storage Co.*, 311 NLRB 371, 386 (1993); *Great Western Produce*, 299 NLRB 1004 (1990); *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1016 (1982). A unilateral change by an employer affecting such a mandatory term and condition of employment is normally regarded as per se refusal to bargain. *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997).

Generally speaking, national labor policy disfavors the waiver of statutory rights by unions. *Resorts International Hotel Casino v. NLRB*, 996 F.2d 1553, 1559 (3d Cir. 1993). Thus, a waiver will not be found unless an employer can show that the union "clearly and unmistakably" waived its right to bargain over a particular work rule, such as the attendance policy in this case. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 608 (1983). Nor will one be lightly inferred from a general contractual provision. Id. at 608. "Management-rights clauses that are couched in general terms and that make no reference to any particular subject area will not be construed as waivers of statutory bargaining rights." *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995); also *AK Steel Corp.*, 324 NLRB 173 (1997), *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989). Rather, any such waiver must be "explicitly stated" in the contract. See *Equitable Gas Co.*, 303 NLRB 923, 929 (1991; referencing *Metropolitan Edison Co. v. NLRB*, supra. A clear and unmistakable waiver may also be implied from the parties' past practice or bargaining history. However, the employer must show that the matter at issue was fully discussed and consciously explored during negotiations and that the union consciously yielded or clearly and unmistakably waived its interest in the matter. *NLRB v. New York Telephone Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991), enfg. 299 NLRB 351 (1990); *Resorts International Hotel Casino v. NLRB*, supra.

The purported waiver language relied on by Respondent, contained in section 1 of the "Management Rights" clause of the parties' agreement, states that "the Company has the exclusive right to manage the plant and its business, and to exercise the customary functions of management in all respects." Section 2 of the same clause authorizes the Respondent to make "such fair and reasonable rule . . . as it may from time to time deem best for the purposes of maintaining order, safety, and/or effective operation of Company plant." Clearly, the overly broad language of section 1 makes no reference to the attendance policy, or to any other company rule for that matter, and consequently lacks the required specificity to support a finding of waiver by the Union of its right to bargain over the February 1, changes in the attendance policy. See, *Kansas National Education Assn.*, 275 NLRB 638 (1985), where the Board found that language strikingly similar to the section 1 language relied on here by the Respondent did not constitute a waiver.

Nor was Respondent justified in inferring such a waiver from the "such fair and reasonable rule" language of section 2, for the applicable standard is not whether the Respondent believes a waiver exists, but rather whether such an interpretation is supported by "clear and unmistakable language." *Elliott Turbomachinery Co.*, 320 NLRB 141 (1995). The section 2 language here is not unlike the management-rights clause in *Johnson-Bateman*, supra, which similarly authorized the employer therein to "unilaterally issue, enforce, and change company rules." The Board in *Johnson-Bateman* declined to find a waiver because the management-rights clause was "couched in the most general of terms and makes no reference to any particular subject area, much less a specific reference to drug/alcohol testing," the matter over which the employer was claiming waiver. Id. at 185. Accordingly, I find that the management-rights clause in the parties' agreement does not constitute a waiver of the Union's right to bargain over the attendance policy.

The Respondent, as noted, also relies on past practice to justify its unilateral conduct, claiming in this regard that it had made a similar unilateral change in the attendance policy at its Elba, Alabama facility, which unilateral action had been upheld by an arbitrator who ruled the Respondent was authorized to make the change under the management-rights clause of the collective-bargaining agreement covering the Elba employees. The Respondent's argument is disingenuous at best, for whatever past practice may have been established at the Elba facility between it and the International Association of Machinists (IAM), which represents employees there and whose labor agreement presumably contains different terms and conditions of employment, it clearly has no bearing on or application to the employees at the Northumberland facility or to its bargaining relationship with the Union herein.[27] Thus, any pattern or practice that might have developed between Respondent and the IAM during the course of their bargaining relationship is neither binding nor controlling on the Union or the Northumberland employees it represents. *General Electric Co.*, 296 NLRB 844 (1990). Thus, even accepting as true Respondent's claim that it has a past practice of making such unilateral changes in work rules at the Elba facility, it was not at liberty to implement similar changes in employee work rules at Northumberland unless the matter at issue, the new attendance policy, had been fully discussed and consciously explored between the Respondent and the Union, and the latter consciously yielded or clearly and unmistakably waived its interest in the matter. *Johnson-Bateman*, supra. No such claim or showing has been made here by the Respondent. Accordingly, I find that the Union at no time either through express language in the contract or by implication, waived its right to bargain over the change in attendance policy implemented on February 1, and conclude that the Respondent's unilateral decision to do so violated Section 8(a)(5) and (1) of the Act.

3. The information request

The complaint further alleges that the Respondent's refusal to comply with the Union's request for all occurrences issued to employees prior to 1995, and to provide it with information on where such information is maintained, also violated Section 8(a)(5) and (1). I find merit in the allegation. It is well settled that an employer, on request, must provide a union with information that is relevant to its ability to carry out its statutory duty of representing employees, including information relevant to contract administration and negotiations. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). Such information is deemed to be presumptively relevant when, as here, it pertains to unit employees represented by the Union.

While not disputing the relevancy of the information sought by the Union (G.C. Exh. 1[t], par. X), the Respondent nevertheless contends that the Union's request was too vague and ambiguous for it to properly respond, and that in any event it made a good-faith effort to do so by permitting Bower and Attinger to

[27] While admitting that its contract with the IAM and its contract with the Union herein are not identical, the Respondent nevertheless claims that the "substance" of the management-rights clause in both agreements are "substantially the same" (R. Br. 43, fn. 19). Sawyer testified that the clauses are "very similar, particularly the wording regarding making fair and reasonable rules and regulations" (Tr. 586). The Respondent did not produce the Elba contract for comparison purposes, despite attorney Mitchell's representation at the hearing that he had a copy of the agreement with him and intended to introduce it into evidence. The failure to do so leads me to doubt Sawyer's testimony regarding the similarity of the management-rights clauses in both agreements.

search employee personnel files for the information (R. Br. 43–46). Neither contention is true.

The record evidence convinces me that the Union's request for all "occurrences" issued to unit employees before 1995 was neither vague nor ambiguous, and that Gordy, to whom the request was sent, fully understood what the Union was seeking. Thus, while placed under a general heading of "Discipline Process," the request, on its face, asks for nothing more than the "number of occurrences" issued to employees under the old attendance policy and "the date of each employee's last occurrence." The Respondent obviously knew what an occurrence was, and how it impacted on the disciplinary process, for the concept is clearly spelled out in its old attendance policy (R. Exh. 1). Moreover, it is fairly apparent from their testimony that both Gordy and Sawyer fully understood what an occurrence was (Tr. 511; 601).

Gordy nevertheless testified that he understood the Union's December 21 letter to be a request for "any discipline that had been issued in the past for not only absenteeism but any type of discipline that had been issued" to unit employees. How Gordy could have read so much into the request is beyond any reasonable comprehension, for nothing in the wording of the request for occurrences can be read to suggest, even remotely, that the Union was asking for all disciplinary action taken against unit employees for whatever reason. The old attendance policy, with which Gordy would have been familiar, draws a clear distinction between an "occurrence" and the various disciplinary measures, e.g., verbal/written warning, suspension, discharge, that can result through an employee's accumulation of occurrences. Gordy does not contend that he was unaware of this distinction. Thus, when the Union on December 21, 1994, asked Gordy to provide it with "the current number of occurrences" that each unit employee had on file under the existing attendance policy, along with the date of each employee's last occurrence, Gordy, I am convinced was not confused by the request. But even if I were to believe that Gordy was somehow confused by the December 21 request, all he had to do was ask the Union for some clarification. "An employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." See *Keauhou Beach Hotel*, 298 NLRB 702 (1990), and cases cited therein. Gordy never bothered to do so, opting instead to ignore the request for almost 2 months, forcing the Union to renew its request at the first bargaining session on February 8.

Gordy testified that he viewed the Union's second request on February 8, as he did the initial request, e.g., as a demand for "any discipline that had been issued in the past for not only absenteeism but any type of discipline that had been issued" (Tr. 514). Sawyer's testimony as to what the Union requested at the February 8 meeting does not concur with Gordy's above description of the request. Rather, Sawyer claims that McHugh asked for "a chance to look at all attendance sheets and any disciplinary action that might relate to attendance in the Northumberland plant," but could not recall McHugh mentioning the word, "occurrence" (Tr. 590). However, both Gordy's and Sawyer's account of what McHugh asked for on February 8, are contradicted by Respondent's own bargaining notes for that day showing clearly that McHugh only asked for "attendance sheets and occurrences" (C.P. Exh. 5, p. 2). The Union's bargaining notes likewise show McHugh asking for "attendance and occurrence records," and at one point clarifying that he wanted the "record on how many occurrences [were issued to employees] before the new [attendance] policy took effect," because the Union needed the information "for this negotiation and a grievance" (G.C. Exh. 47, p. 4). Both sets of bargaining notes therefore reflect McHugh's February 8 request to be fully consistent with his December 21, 1994 written request, and lay bare the obviously false claims by Gordy and Sawyer that McHugh requested to see disciplinary information on unit employees. Again, if either Gordy or Sawyer had doubts as to what the Union was after, it was never made known to McHugh, for nothing in their testimony or in the bargaining notes suggests that they asked for any such clarification, leading me to believe that they fully understood the nature of the request.

The Respondent suggests that the ambiguity and confusion of the request was made evident by McHugh's and Bower's purported inability at the hearing to define an "occurrence." A review of their testimony reveals that despite efforts by Mitchell to obfuscate the issue, McHugh and Bower were not confused and adequately described what an occurrence was and how it factored into the attendance and disciplinary process (Tr. 225; 332). In fact, Respondent's reference on page 44 of its posthearing brief to "disciplinary occurrences" suggests that it was Respondent's own counsel, not McHugh or Bower, who was confused, for the Respondent has suggested, nor is there any evidence in the record to show, that the Respondent has such a thing as a "disciplinary occurrence." Rather, the record reflects that while employees are issued occurrences, they are not considered disciplinary until such time as they are accumulated in the manner described in the old attendance policy. But even if I were to accept, which I do not, Respondent's assertion that McHugh and Bower seemed confused about this issue at the hearing, as found above Gordy and Sawyer clearly were not, for both understood what an occurrence was and had no reason to be confused. Further, assuming arguendo that McHugh may have been confused when he first requested the information on December 21, 1994, and that he mistakenly asked for "occurrences" when what he wanted were disciplinary records, the Respondent had no way of knowing this for, as found above, the information request on its face, clearly and unambiguously, asked for "occurrences," not disciplinary records. Thus, the Respondent's lawful options were twofold: either (1) comply with the information request by providing the Union with the requested occurrences, at which time the Union, if this was not what it was actually seeking, would have so apprised the Respondent; or (2) confirm any doubts it may have had regarding the request by asking the Union for clarification. The Respondent, as noted, did neither, and chose instead a third and clearly impermissible option of simply ignoring the request.

The Respondent nevertheless contends that it made a good-faith effort to comply with the information request by allowing Attinger and Bower to search employee personnel files for the requested information. The Respondent's conduct was anything but good faith, for the evidence makes clear that the Respondent simply sent the union officials on a proverbial "wild goose chase" as it knew quite well that "occurrences" issued to employees were not maintained in their personnel files but were instead kept in a separate file in Winnick's office. The record reflects that after examining employee personnel files for 1 week, Attinger and Bower not surprisingly came up empty-

handed, finding none of the pre-1995 occurrences they were looking for. Attinger claims he discussed his findings, or lack thereof, with Winnick, and that when he asked Winnick where the occurrence records were kept, the latter denied knowing who kept them or where they were kept. Winnick, as noted, did not testify. Attinger's testimony therefore stands unrefuted and is credited.

Testimony by employee Neitz, Winnick's receptionist, shows that Winnick lied to Attinger about knowing where occurrences were kept. Neitz testified that from 1993 until November 1995, she was responsible for maintaining employee attendance records and that prior to February 1995, when the new attendance policy was put into effect, she recorded employee occurrences on attendance cards that were stored in a metal box in Winnick's office, and that after February 1, employee absences and occurrences were recorded on individual sheets of paper, rather than cards, and maintained in a three-ring looseleaf binder. Prior to the strike, the attendance book was kept in Winnick's office, but following the walkout Neitz kept the book on her desk in the reception area. The Respondent's admission in its posthearing brief, that the attendance records were kept in Winnick's office (R.Br. 44–45), corroborates Neitz' account and makes clear that Winnick knew all along where the employee occurrences were maintained but chose to lie about it. Respondent's failure to call Winnick to dispute the above testimony by Attinger or Neitz warrants an adverse inference that if called Winnick would not have refuted their testimony. *Frances House, Inc.*, 322 NLRB 516, 520 (1996); *A–1 Portable Toilet Services*, 321 NLRB 800, 804 (1996).

In sum, I find that Respondent's refusal to provide the information requested on December 21, and again on February 8, resulted not from any ambiguity in the request but rather from Respondent's own unwillingness to comply with the request. Respondent's conduct in ignoring the request for almost 2 months, and thereafter sending union officials on what it knew to be a wild good chase, convinces me that it never intended to furnish the Union with the information, and that its claim of being confused by the request is nothing more than a post hoc attempt at justifying its unlawful conduct. Indeed, Gordy's testimony that he did not provide the information because "it was too voluminous for the company to prepare" serves to undermine Respondent's argument that the information was not provided because of the vagueness of the request (Tr. 514). Further, his admitted refusal to furnish the requested information is consistent with McHugh's claim, which I credit, that Gordy took the position he did not have to give the Union such information (Tr. 239). Accordingly, I conclude that Respondent's failure and refusal to comply with the Union's December 21, information request violated Section 8(a)(5) and (1) of the Act, as alleged.

4. The strike

a. Its nature

The General Counsel contends, and the Respondent disputes, that the strike that began on June 26, and ended on October 16, was from its inception and at all times thereafter an unfair labor practice strike. I agree with the General Counsel.

The character of a strike depends on its cause. Thus, a work stoppage by employees is considered an unfair labor practice strike if it is motivated, at least in part, by an employer's unfair labor practices. *C-Line Express*, 292 NLRB 638 (1989). Characterization of a strike as such is not dependent on a finding that the strike would not have occurred but for the commission of the unfair labor practices. *Decker Coal Co.*, 301 NLRB 729, 746 (1991). Rather, so long as an unfair labor practice has "anything to do with" causing the strike, it will be considered an unfair labor practice strike. *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 fn. 5 (1995), quoting *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 419 U.S. 850 (1972).

As found above, prior to the start of the strike the Respondent committed numerous unfair labor practices that included, inter alia, the February 1, unilateral change in the attendance policy, its refusal to comply with the Union's request for copies of "occurrences" and location of employee attendance records, soliciting employees to bring their grievances to supervisors rather than to the Union, and threatening employees with plant closure. The minutes of a February 24 union meeting reflect that the above and other unlawful conduct engaged in by Respondent were discussed by employees as reasons for undertaking the strike if and when the Union deemed such action to be necessary (G.C. Exh. 48, pp. 15–18). Those notes further reveal that the Union was not anxious to strike and had persuaded employees to continue working under preexisting terms and conditions. According to the notes, the Union deemed it best to postpone any job action until the Respondent had committed sufficient unfair labor practices to justify a walkout on those grounds. At the June 24 union meeting, the Union decided that the time had come to strike, and cited the prior unremedied unfair labor practices discussed at the February 24 meeting, as well as Respondent's decision not to continue checking off union dues, as justification for the strike (G.C. Exh. 48, pp. 39-40).

Several witnesses testified as to the reason for the strike. McHugh testified that it was the Union's intent to have the strike declared an unfair labor practice strike, and that he cautioned employees against relying on some other reason to strike. He further testified that Respondent's subcontracting of bargaining unit work to Bankhead, its unlawful implementation of a new attendance policy, its disciplining of union officials for conducting union business, its practice of reassigning employees on light duty to other departments, and the numerous threats to close the Northumberland facility, all were discussed with and among employees when the decision to strike was made. While Respondent's decision to discontinue dues checkoff was also cited by McHugh as a reason for the strike, he credibly testified that it was not the determinative factor (Tr. 192–196; 255–263).

Bower and Purcell could not recall all the reasons discussed at the union meetings, but did recall that the discipline imposed on Bower for conducting union business, and Respondent's change in attendance policy were two of the reasons for the strike (Tr. 393; 469). Goguts testified that she voted to strike primarily because of Respondent's unlawful change in attendance policy, its subcontracting of work to Bankhead, and the transfer of an employee outside his classification. Maneval gave as his reason for striking Respondent's misuse of the "light duty policy," and its elimination of the "Dorsey dollars" program caused by the unilateral change in the attendance policy. According to Maneval, these and other reasons he could not readily recall were discussed among employees at the union meetings and presented as reasons for going on strike (Tr. 404; 445).

The above testimony, none of which was refuted by the Respondent, and the minutes of the union meetings, make clear that the strike which began on June 26, was motivated, if not exclusively at least in part, by Respondent's unfair labor practices. Remarkably, the Respondent contends that McHugh somehow orchestrated and manipulated the facts "to have the strike declared an unfair labor practice strike." In making this rather inane argument, the Respondent conveniently ignores the fact that it was the one, and not McHugh or the Union, who unilaterally implemented a new attendance policy, who refused to furnish the Union with requested information, who threatened employees with plant closure, and who unlawfully subcontracted unit work to Bankhead. This and other conduct unilaterally engaged in by the Respondent, without any assistance from or manipulation by McHugh, was what persuaded employees to walk out. It is the height of absurdity for the Respondent to argue that it was somehow forced by McHugh or the Union to engage in the above unlawful practices. I fail to see how the Union can be blamed for having had sufficient foresight and being intuitive enough to advise its members against walking out to protest something other than unfair labor practices. The Respondent's claim that it was somehow "baited" or "entrapped" by the Union into committing unfair labor practices is simply not supported by the record evidence and, in my view, so absurd as to warrant no further discussion. The simple fact is that it was the Respondent who engaged in the unfair labor practices that provided the Union with the necessary fodder to justifiably declare the walkout an unfair labor practice strike. I am convinced that but for the Respondent's unlawful conduct, the employees would not have risked walking off the job on June 26. Accordingly, I find that the strike which began on June 26, and which ended on October 16, when strikers, through their Union, unconditionally offered to return to work, was from its inception and unfair labor practice strike.

b. The reinstatement question

It is further alleged that the strikers were unlawfully denied reinstatement following their unconditional offer to return to work. The Respondent disputes the claim, and avers that following the offer to return to work, "the Company promptly terminated all temporary employees and began bringing the striking members back to work" (R.Br. 65). The Respondent's claim is not supported by the record.

It is well settled that unfair labor practice strikers are entitled to immediate and full reinstatement to their former jobs, or to substantially equivalent jobs if their original positions are no longer available, upon their unconditional offer to return to work. *Super Glass Corp.*, 314 NLRB 596, 598 (1994); citing *Harowe Servo Controls*, 250 NLRB 958, 1070 (1980); *Capitol Steel & Iron Co.*, 317 NLRB 809, 814 (1995). The Board, however, has found that a 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible, and the employer's need to effectuate that return in an orderly manner. See *Beaird Industries*, 311 NLRB 768, 771 (1993), citing *Drug Packaging Co.*, 228 NLRB 108, 113 (1977), modified on other grounds 507 F.2d 1340 (8th Cir. 1978). The 5-day period, however, will not apply where an employer ignores or rejects, or has already rejected an unconditional offer to return to work, unduly delays its response to such an offer, or attaches unlawful conditions to its offer of reinstatement. *Newport News Shipbuilding*, 236 NLRB 1637, 1638 (1978), enfd. 602 F.2d 73 (4th Cir. 1979).

Initially, it should be noted that the Respondent did not respond to the Union's October 16 offer until 3 days later, hardly what one would consider a "prompt" response, and offered no explanation at the hearing or in its posthearing brief for the delay. When it did respond on October 19, its attorney, Mitchell, advised the Union that Respondent would begin letting the temporary workers go, and recalling strikers, at the start of the following week, October 23, e.g., 4 days hence. The record reflects that the Respondent indeed began terminating its temporary workers and recalling strikers on October 23, albeit in piecemeal fashion, for rather than terminating all temporary workers at once, it dismissed only three temporary employees on October 23, two on October 24, and one on October 25. The bulk of its temporary work force, the remaining 41, were not discharged until October 26. Its recall of strikers, as noted, was likewise handled in piecemeal fashion, with only 7 strikers recalled on October 23, 3 each on October 24, 25, and 27, and 14 on October 30 (see Jt. Exh. 2, attachment to April 23, 1996 letter from attorney Mitchell to Board Agent Donald Spooner).

The only explanation proffered by Mitchell during the October 19 meeting for not immediately terminating the temporary workers and recalling strikers was that under the Worldwide Labor agreement, the Respondent, in the event of cancellation, was obligated to compensate temporary workers who had been employed less than 1 week for a full 40-hour workweek. The problem with this argument is that Mitchell readily admitted he did not know how many of the 47 temporary workers on the payroll as of October 16, had been employed for less than 1 week, and the Respondent, who bears the burden of explaining the delay in not returning strikers sooner, produced no evidence to show how many of the temporary workers employed as of October 16, fit that description. There is, in any event, no question that the Respondent did not begin returning strikers until seven days after they unconditionally offered to do so. As the Board in *Drug Packaging*, supra, made clear, administrative difficulties are not a basis for delay beyond the 5-day period. Nor was Respondent permitted to reinstate strikers in piecemeal fashion. Rather, it was obligated to take the employees back as a group, placing, if necessary, those for whom no work was available, after dismissing the replacements, on a preferential hiring list. *Orit Corp.*, 294 NLRB 695, 699 (1989). The Respondent's entire course of conduct relative to the reinstatement issue, beginning with its 3-day unexplained delay in responding to the Union's October 16, unconditional offer to return to work, its failure to produce evidence to support its claim that it could not immediately discharge the temporary workers, its decision to begin the recall process 7 days after the unconditional offer to return to work, clearly beyond the 5 days permitted by the Board, and the piecemeal manner in which it reinstated strikers, convinces me that Respondent's actions were deliberate and retaliatory in nature, intended to delay the strikers' return as long as possible. In these circumstances, the Respondent was not entitled to delay the recall process for 5 days, but rather remained obligated to offer the strikers immediate and full reinstatement on its October 16, receipt of the unconditional offer to return to work. By failing to do so, the Respondent, I find, violated Section 8(a)(3) and (1) of the Act, as alleged.

5. The decision to transfer all bargaining unit work to Cartersville and to close the Northumberland plant

1. The 8(a)(5) and (1) allegation

a. Applicability of the Dubuque test and Respondent's defense

The complaint alleges, and the General Counsel contends, that the decision to permanently relocate all bargaining unit work to Cartersville and to close the Northumberland facility was a mandatory subject of bargaining under *Dubuque Packing Co.*, [28] and that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to give the Union prior notice of, and an opportunity to bargain over, that decision.[29] The Respondent agrees that *Dubuque Packing* is applicable, and concedes that the General Counsel has satisfied her initial burden of proof (R. Br. 6). However, it contends that the decision to relocate unit work to Cartersville had nothing to do with labor costs, but was instead motivated by a need to maintain production and to avoid the "economic suicide" it purportedly faced due to the strike (R.Br. 8). It further argues that it had decided to move only the *struck* work to Cartersville, and that no final decision on the permanent relocation to Cartersville and the closure of the Northumberland facility was made until after the parties had bargained to impasse on November 6. As labor costs were not, in its view, a factor in its decision, the Respondent avers that under *Dubuque Packing*, supra, its relocation and plant closing decision was not a mandatory subject of bargaining that had to be negotiated with the Union before being implemented, and that even it was, the Respondent fully complied with the requirement by bargaining to impasse with the Union on the issue. It takes issue in this regard with the General Counsel's claim that the decision was made before the parties resumed negotiations on October 13. The Respondent's claims are found to be without merit.

As the Respondent concedes that its relocation to Cartersville did not involve a change in the scope or direction of its operation, it bears the burden under *Dubuque Packing* of showing that labor costs did not factor into its decision. The Respondent has not done so here. Although I am convinced, for reasons more fully discussed infra, that Respondent had made up its mind to relocate to Cartersville and to close the Northumberland facility long before notifying the Union, and that it had no intentions of reversing that decision, at all times following notification to the Union the Respondent, through Attorney Mitchell, engaged in the charade of trying to convince the Union during negotiations that it wanted to remain in Northumberland, that its decision to relocate and to close Northumberland were only tentative, and that it would be willing to remain in Northumberland if it received serious concessions in wages and other benefits from the Union.

Thus, beginning with the October 13 bargaining session and continuing through the last one held on November 6, Mitchell repeatedly insisted that Northumberland would close unless it received serious concessions from the Union. The Union's October 13 bargaining notes, for example, reveal that Mitchell told McHugh that the future of Northumberland was in the Union's hands, that the Respondent would consider keeping the plant opened if the Union gave it a reason for doing so, and that while Respondent presumably had not yet decided what to do, the decision of whether it was to remain opened was up to the Union. Mitchell repeated the same theme at the October 19 session, this time with a bit more specificity. The parties' bargaining notes for that day show Mitchell emphasizing that absent serious concessions in salary and benefits, and a mandatory overtime requirement, the Northumberland facility could not remain open. Quoting from Respondent's own notes, Mitchell stated, "Now it will take an attractive offer, with major concessions. Any new contract would have to have concessions in: wages, benefits, holidays, and vacations. And of course, we would need mandatory overtime. We want to run this plant as profitably as Cartersville" (C.P. Exh. 5, p. 53). Mitchell continued to drive home this point at the October 26 session, when he advised the Union that it needed "to come up with a proposal for us to want to stay here," and again at the final November 6 meeting by reiterating that the Northumberland plant would close unless the Union submitted a counterproposal along the lines of the Respondent's own "bullet points" proposal which, as noted, called for steep concessions in, among other things, wages and other employee benefits.

The above evidence makes clear that the Respondent openly and repeatedly asked for serious labor concessions, e.g., reductions in wages, holidays, vacations, fringe benefits, overtime, and other benefits, as the quid pro quo for not relocating to Cartersville and keeping the Northumberland facility opened. In view thereof, I find that the Respondent has not sustained its *Dubuque Packing* burden of showing that labor costs were not a factor in its decision to relocate to Cartersville. *Owens-Brockway Plastic Products*, 311 NLRB 519, 522 (1993).

The Respondent further contends, on brief, that even if labor costs are found to have played a role in its relocation decision, the savings anticipated by the move were such that any "wage concessions" the Union might have offered would not have been sufficient to alter the decision (R.Br. 10). Its contention is without merit for, as found above, at all times following the

[28] 303 NLRB 386 (1991), enfd. 1 F.3d 24 (D.C. Cir. 1993). In *Dubuque*, the Board established a two-part test for determining when a relocation of unit work constitutes a mandatory subject of bargaining. Under that test, the General Counsel bears the initial burden of showing that the employer's decision to relocate bargaining unit work was unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel succeeds in making such a showing, he will have established prima facie that the relocation was a mandatory subject of bargaining. To avoid liability, the employer must then show through a preponderance of credible evidence that labor costs (direct and/or indirect) were not a factor in the decision *or* that even if they were, the union could not have offered the necessary labor cost concessions that could have changed its decision to relocate. Id at 391.

[29] I find no merit to Respondent's suggestion that the decision to purchase and relocate work to Cartersville was separate from the decision to close Northumberland (R. Br. 32). As found above, the Respondent issued its first 60-day WARN notice to Neitz and presumably other nonunit employees at around the same time it began negotiating with Taylor for the purchase of the Cartersville facility, e.g., mid-September. There was no reason for Respondent to issue such notices unless, of course, it was planning to close Northumberland. Nor do I believe Respondent would have been planning to close Northumberland unless it was certain it could continue production elsewhere. The only other location that was being considered at the time was Cartersville. Further, the shutdown schedule prepared on or before October 5, shows that both events were being planned to coincide with each other (G.C. Exh. 51). Finally, Mitchell statement to the Union that Respondent had no need for two facilities suggests that Respondent had no intentions of keeping both facilities opened, and that the opening of the Cartersville facility meant that the Northumberland plant would close. In light of the above, I find that the purchase of the Cartersville facility was inexorably linked to the closing of Northumberland and that with the happening of the former event, the fate of the Northumberland, along with the jobs of the strikers, was sealed.

October 9 notification to the Union, the Respondent repeatedly assured the Union that it would reverse its decision to relocate and to close the Northumberland facility if the Union were to provide it with serious concessions in wages and other benefits. Either the Respondent was not being truthful with the Union, a possibility which given my findings below I find to be the more likely scenario, or such a reversal was indeed possible with the proper concessions, rendering specious Respondent's above contrary assertion. See *Elliott Turbomachinery Co.*, 320 NLRB 141, 157 (1995), where the Board, inter alia, rejected a post hoc claim by an employer that labor cost concessions would not have altered its decision to relocate to another facility because the employer had sought concessions from the union. Indeed, the Respondent's posthearing brief is self-contradictory on this point, for it readily admits that "the Union was offered the opportunity to match, through concessionary bargaining, the financial incentives offered by the State of Georgia" (R. Br. 8). If the Respondent did not believe the Union could offer sufficient concessions to alter its decision to relocate to Cartersville, why would it have asked for such concessions in the first place?[30]

Other factors, however, serve to undermine the Respondent's above defense. Thus, while the Respondent claims the Union could not have offered sufficient "wage concessions" to have made a difference, it offered no evidence to show that wages for unit employees at Northumberland were already so low that the Union could not have garnered sufficient savings in this area to "approximate, meet, or exceed" the benefits anticipated by Respondent at Cartersville. *Dubuque Packing*, supra. "An employer must offer something more than a self-serving assertion that there was nothing the bargaining agent of its unionized employees could do to change its mind." *Geiger Ready Mix Co. of Kansas City*, 315 NLRB 1021, 1032 (1994). Moreover, while Mitchell told the Union that wages and benefits would be lower at Cartersville than they were at Northumberland, there is no indication that he ever provided the Union with information on what those wage rates and benefits would be, or that he spelled out the specific cost savings anticipated by Respondent at Cartersville. Without such information, the Union could not have known what, if any, "wage concessions" unit employees might have to make in order to "approximate, meet, or exceed" the Cartersville savings alluded to by Mitchell.

Moreover, even if, as Respondent on brief suggests, the Union could not have offered sufficient "wage concessions" to make a difference, there remained the likelihood that the savings needed to change Respondent's mind, if indeed that was a possibility, could have been obtained through reductions in other employee benefits. See *Homes & Narver*, 309 NLRB 146, 147 (1992). As the Respondent never provided the Union with the specific cost savings anticipated from its decision to relocate to Cartersville, the Union was left in a position of not knowing what it would take in the way of concessions in wages and/or other benefits to keep Respondent in Northumberland. The "bullet points" proposal was obviously not intended to serve that purpose, for it makes no reference to the cost savings that would result from the move to Cartersville, and served as nothing more than a blanket request by Respondent for concessions in all areas without regard to whether all "bullet points" concessions were needed to meet those cost savings. In light of the above, I find that Respondent could not have known if the Union was capable of offering sufficient labor cost concessions to enable it to "approximate, meet, or exceed" the anticipated Cartersville savings. The Respondent's bare assertion that the move to Cartersville would result in savings that the Union could not possibly meet through "wage concessions" thus falls far short of what is needed to meet its defense under the second prong of *Dubuque Packing*, supra at 392. See also *Owens-Brockway Plastic Products*, supra at 525. Accordingly, the Respondent's decision to permanently relocate all unit work to Cartersville and to close Northumberland was at all times a mandatory subject of bargaining.

b. Respondent's impasse defense

The Respondent, as noted, claims that even if its decision to relocate to Cartersville and to close Northumberland is found to be a mandatory bargaining subject, it fulfilled its bargaining obligation by bargaining to impasse on that issue, with impasse being reached on November 6. The Respondent's claim is without merit for I am convinced the Respondent presented the Union with a fait accompli regarding its decision. Alternatively, the Respondent has not shown that the parties were at impasse on November 6, so that even if it did not present the Union with a fait accompli, its claim would nevertheless lack merit.

(1) The Union is presented with a fait accompli

A bargaining impasse occurs when good-faith negotiations have exhausted the prospects of reaching an agreement. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967). Good-faith bargaining requires timely notice and meaningful opportunity to bargain regarding the employer's proposed change, as no genuine bargaining can be conducted where the decision has already been made and implemented. Thus, no impasse is possible where an employer presents the union with a "fait accompli" as to a matter over which bargaining to impasse is required. *S & I Transportation,* 311 NLRB 1388, 1390 fn. 4 (1993). In determining if a union has been presented with a fait accompli, the Board looks for objective evidence. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993). There is ample objective evidence here to support a finding that the decision to relocate all unit work to Cartersville and to close the Northumberland facility was predetermined, and well on its way to being implemented, by October 13, when the parties resumed negotiations to bargain over that very issue.

There is no disputing that the decision to buy the Cartersville facility and to transfer production work to that facility from Northumberland was made prior the Union being notified on October 9, and certainly before the parties resumed bargaining on October 13. The Respondent, however, contends that its decision at all times remained tentative pending negotiations with the Union and could have been reversed with the proper concessions. It argues in this regard that the only work it had decided to move prior to the start of negotiations was the *struck* work (R. Br. 35), that its agreement with Taylor to purchase Cartersville was also tentative and did not become final until the deal was closed on November 14 (R. Br. 31), and that no final decision was made to close the Northumberland facility

[30] Sawyer, as found above, told McHugh on October 9, that the decision to move all unit work to Cartersville was irreversible, nothing in his comments suggests that the reason the decision was irreversible was because the Union would not have been capable of offering sufficient labor cost savings to prevent the move. Significantly, Sawyer's remarks about the inevitability of the move conflicts with Respondent's assertion that the decision was reversible if only the Union would provide it with some serious labor cost concessions.

until impasse was reached on November 6. In essence, the Respondent argues, implicitly, that because everything the Respondent had done thus far could have been undone as late as November 6 (Tr. 669), it could not have presented the Union with a fait accompli. The evidence reveals otherwise.

Thus, Respondent's suggestion on brief that on October 5, it had simply begun "negotiating to purchase the Cartersville facility" (R. Br. 4), is contradicted by an October 5 memo from Marks to Respondent's board of directors advising that agreement with Taylor had been reached that same day.[31] Nothing in her memo suggests that the agreement was subject to further negotiations or that it was only tentative. Indeed, Marks' further statement to the board of directors that she intended to make the agreement public 4 days hence, e.g., on October 9, by announcing it to all of Respondent's constituents, including the Cartersville employees, supports the view that the agreement was a "done deal" by October 5, for it is highly unlikely that Marks would have been prepared to announce the purchase of the Cartersville facility unless the agreement was final and irreversible.

Sawyer's phone message and subsequent statement to McHugh on October 9, along with comments he admits making to a local newspaper, The Press Enterprise, on October 13, further establishes that the decision to move was not tentative. Thus, in his October 9 phone message, Sawyer told McHugh in no uncertain terms that Respondent *had* purchased another facility in Georgia and planned to move production to that facility in 4–6 weeks. Nothing in his message can be read to suggest that the Cartersville purchase and planned relocation of unit work were only mere possibilities that Respondent was considering. In fact, to ensure that McHugh understood that such a decision had been made, Sawyer repeated a little later in his message: "But again, we've made the decision to move production out of Northumberland. The Company has purchased a plant and we plan on moving . . . ." When McHugh called Sawyer later that day to discuss the message, any doubts the former may have had regarding the permanent nature of the move were laid to rest when Sawyer told him the decision was irreversible and the Union could do nothing to alter that decision. Four days later, Sawyer reaffirmed Respondent's commitment to move when he informed news reporter James Long of The Press Enterprise that no matter the outcome of the negotiations which were to resume that day, the decision to move had been made, it was "definitely happening."

In its posthearing brief, the Respondent avers that Sawyer was simply mistaken when he told The Press Enterprise that the move to Cartersville was definite. However, Sawyer, who did not deny making the remarks, at no point in his testimony claimed he had been mistaken in his remarks or been misquoted by Long. Indeed, during Sawyer's examination, the Respondent's counsel made no effort to have Sawyer disavow his remarks. Sawyer did try to offer an explanation for his remarks by suggesting that his remarks were intended to reflect that Respondent was planning to move only the *struck* work to Cartersville. His explanation is found not to be credible, for nothing in his remarks makes reference to struck work. In fact, his comments to The Press Enterprise are consistent with his earlier remarks to McHugh that the decision to move had already been made and was irreversible. Finally, given Sawyer's role as Respondent's chief negotiator, his relatively high position with Company, e.g., human resources vice president, and his presence during the talks that led to the Cartersville purchase, it is highly unlikely he would not have known whether the decision to relocate was permanent. The Respondent has not suggested that Sawyer was unaware of Respondent's plans. Accordingly, I find that Sawyer knew full well what Respondent's intentions were and accurately reported them to The Press Enterprise reporter, Jones. Ironically, while the Respondent disputes the accuracy of Sawyer's remarks to The Press Enterprise, it has raised no similar concern with respect to Sawyer's remarks to McHugh on October 9, which, as noted, conveyed the identical message to the Union as to the inevitability of the move to Cartersville.[32]

Mitchell's own statement to the Union on October 13, that Respondent had decided to move "*all* production work" to Cartersville, and his June 12, 1996, statement to the Board, that the Union had been advised from October 9, onward that the decision "to transfer work to Cartersville *had been made*," likewise serves to confirm the permanency of the move, and makes clear that said decision was made before the start of negotiations on October 13 (G.C. Exh. 47; Jt. Exh. 2). Mitchell, like Sawyer, did not qualify his above remarks in any way. Consequently, I find no basis for inferring that his remark about *all* production work going to Cartersville was intended only as a reference to *struck* work, or that his further statement, that the decision *had been made* to transfer all work, should be read to mean that the decision was only tentative, rather than permanent. Thus, while Mitchell did advise the Union during negotiations that everything that had been done thus far could, with the proper concessions, "be undone," given the evidence showing that the decision to relocate was irreversible, Mitchell's statements I am convinced were simply intended to mask the true nature of the decision and to create the illusion that the Respondent was engaging in serious and good-faith negotiations with the Union.

Accordingly, I find that the Respondent presented the Union with a fait accompli, for having made the decision to relocate to

[31] See Jt. Exh. 2, attachment to June 12, 1996 letter from attorney Mitchell to the General Counsel. Respondent's witnesses provided confusing testimony on when exactly Marks and Taylor came to agreement. Marks, for example, testified the agreement was entered into sometime prior to October 5. Yet, her October 5 memo to the board of directors has her claiming that agreement was entered into that same day. For his part, Mitchell, in a June 12, 1996 letter to the Regional Office, states that the agreement was entered into on October 4, not October 5, as stated by Marks. Gordy, on the other hand, testified the agreement was entered into after the October 5 management meeting. To add to the confusion, the Respondent on brief proffers that on October 5, it had only begun to negotiate with Taylor for purchase of Cartersville (R. Br. 4). Notwithstanding the above ambiguities, one thing is certain: agreement for the purchase of Cartersville occurred, and plans to transfer work thereto were made, well before the Union was officially notified on October 9, and certainly before the parties resumed negotiations on October 13.

[32] The Respondent claims it disavowed the October 13 newspaper article at the bargaining session held that same day. The Union's bargaining notes do reflect that Mitchell told the Union that some of what was contained in the newspaper article was accurate and some was not, that people do get misquoted, and that what he told the Union during the negotiations, rather than what was stated in the article, was the official company position. The purported disavowal I am convinced was part of Respondent's attempt to hide the fact that it had, as found above, already decided to buy Cartersville and to permanently move all production work out of Northumberland. Sawyer, as noted, never claimed to have been misquoted by reporter Long.

Cartersville and to close the Northumberland facility, there was nothing left to bargain over.

(2) The parties were not deadlocked on November 6

However, even I were to find that Respondent did not present the Union with a fait accompli, a finding that Respondent unlawfully implemented its decision would be warranted as the evidence does not support Respondent's claim that it reached a lawful impasse with the Union on November 6. "[A]n impasse exists when good-faith negotiations have exhausted the prospects of concluding an agreement, the parties are in fact deadlocked, and there is no realistic possibility that continuation of the discussions as of that time would have been fruitful." *Klein Tools*, 319 NLRB 661, 690 (1995). Futility, not some lesser level of frustration, discouragement, or apparent gamesmanship, is what must appear if impasse is to be found. *CJC Holdings*, *Inc.,* 320 NLRB 1041, 1044 (1996). In *Taft Broadcasting*, supra, the Board stated that in determining whether an impasse exists such relevant factors as the parties' bargaining history, their good faith during the negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations must be considered. Thus, both sides, not just one, must have decided that further negotiations would be futile. The burden of proof as to whether an impasse has been reached rests with the party making the assertion, in this case the Respondent. *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992). The Respondent has not done so here.

Several factors here undermine Respondent's claim that impasse was reached on November 6. First, at no time during or after the November 6 meeting did the Respondent express, either through words or conduct, a belief that the parties had exhausted all possibility of reaching agreement on the relocation and plant closing issue, or that further talks would be pointless. In fact, the Respondent conveyed just the opposite when it gave the Union assurances that the counterproposals it submitted that day would be seriously considered and that a response would be provided at some later date. A willingness by one party to consider the other's proposals is a clear indication that no impasse has occurred. *CBC Industries*, 311 NLRB 126 (1993).[33] Mitchell's above assurances, coupled with his stated willingness to arrange for future bargaining sessions, would reasonably have convinced the Union that Respondent anticipated continued negotiations on the plant closing issue and that movement beyond the "bullet points" proposal remained a distinct possibility. Clearly, the parties' agreement to meet further is indicative that no impasse had occurred on November 6. *Colfor, Inc.*, 282 NLRB 1173, 1174 (1987), enfd. 838 F.2d 164, 167 (6th Cir. 1988); see also *Sacramento Union*, 291 NLRB 552, 557 (1988). While the parties in fact held no further meetings, Mitchell's November 9 letter to McHugh makes clear that Respondent unilaterally decided to end the talks on the plant closing issue simply because it did not wish to spend any more time on such negotiations, and not because of a belief that the parties were deadlocked in their positions and that further talks would be fruitless. In fact, Mitchell's further statement in his letter, that Respondent had found some of the Union's counterproposals acceptable, is inconsistent with a claim of impasse for it suggests the possibility that compromise would have been possible but for Respondent's abrupt termination of future bargaining. The above facts make patently clear, and I so find, that there was never a contemporaneous understanding by the parties either on November 6, or at any time thereafter, that they had reached impasse in their negotiations.[34]

Further, the fact that the parties met only four times to discuss the relocation and plant closing issue militates against a finding of impasse. While this factor alone cannot be determinative of whether a valid impasse was reached, *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987); also *NLRB v. Powell Electrical Mfg. Co.*, 906 F.2d 1007, 1012 (5th Cir. 1990), it nevertheless remains a relevant factor under *Taft Broadcasting*, supra. *NLRB v. Powell Electrical Mfg*., supra. Here, despite meeting four times, no actual exchange of proposals occurred until October 26. As described above, the first two meetings (October 13 and 19) involved little more than an exchange of, and requests for, information, and discussion of the reinstatement and other rights of unfair labor practice strikers, and service of the 60-day WARN notice. Although the move to Cartersville and the closing of Northumberland were discussed, such discussions amounted to nothing more than repeated assertions by Respondent that serious concessions were needed if the Northumberland facility was to remain open. No actual negotiations on the plant closing issue however took place on either on October 13 or 19. Although on October 26, the parties, as noted, did exchange proposals, except for Respondent's summary rejection of the Union's concessionary mandatory overtime proposal, little if any real bargaining on the plant closing issue took place that day also. For its part the Union, having just been handed a copy of the Respondent's "bullet points" proposal identifying some 31 concessions being sought from the Union, understandably was unprepared and consequently declined to address the "bullet points" at that point in time. The bulk of the 2-½-hour October 26 meeting, as noted, was spent discussing the number of strikers to be reinstated, and the entitlement by those not being reinstated to medical insurance benefits. Only of the November 6, meeting can it be said that some substantive discussion of the plant closing issue took place. Thus, it was during this 2-½-hour meeting that the Union responded to each and every one of Respondent's "bullet points," and offered counterproposals of its own. Realistically then, the most that can be said is that the parties spent a total of 2-½-hours on November 6, engaged in actual negotiations over the plant closing issue. Given these circumstances, the brief number of sessions held, and more importantly the rather insignificant amount time spent in actual negotiations on an issue of obvious paramount importance to all

[33] I find no evidence to indicate that the Respondent intended its "bullet points" proposal to be its last, best and final offer to the Union on the plant closing issue, or that if it was, that this fact was ever communicated to the Union. But even if Respondent had intended this to be its final offer, its willingness thereafter to accept counterproposals from the Union would have left the Union with the clear impression that Respondent's "final offer" might indeed not be final, depending on what the Union might be willing to offer. *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1235 (1989).

[34] I remain convinced that Respondent had no intentions of altering its decision to move to Cartersville and to close Northumberland even if the Union had been agreeable to all of its "bullet points" and that Mitchell, possibly anticipating that this matter might wind up in litigation, simply feigned interest in the Union's counterproposals so as to create the illusion of good-faith bargaining on the part of Respondent.

concerned, when viewed together with the conduct of the parties on November 6, supports a finding of no impasse.[35]

There remains the question of Respondent's overall approach to the negotiations, with the General Counsel asserting, and the Respondent denying, that it engaged in bad-faith bargaining. I am in general agreement with the General Counsel, although I believe that Respondent's bad-faith bargaining began after employees went out on strike. Prior thereto, the Respondent appeared willing to, and in fact did, reach interim agreement on a number of noneconomic issues, a clear indication that it was bargaining in good faith. However, despite its apparent good faith during the prestrike negotiations, the Respondent throughout that period made clear its strong opposition to a strike by repeatedly threatening employees and the Union with plant closure and loss of jobs if they were to walk out. With the advent of the strike, the Respondent's bargaining approach and attitude changed. Thus, at the next bargaining session on July 7, the Respondent reneged on certain interim agreements reached with the Union prior to the strike, as well as a mandatory overtime proposal it had on the table. By October 13, it withdrew its final proposal altogether, and on October 26, submitted its "bullet points" proposal which essentially "gutted" all prior interim agreements and was regressive in nature.

The Board has long held that the withdrawal by an employer of contract proposals tentatively agreed to by both the employer and the union in earlier bargaining sessions without good cause obstructs the bargaining process and is evidence of a lack of good faith. The *General Athletic Products Co.*, 227 NLRB 1565, 1574 (1977), citing to *NLRB v. American Seating Company of Mississippi*, 424 F.2d 106 (5th Cir. 1970); See also, *Dayton Electroplate*, 308 NLRB 1056, 1063 (1992); *Mead Corp.*, 256 NLRB 686, 696 (1981). The Respondent's sole justification for its actions, as testified to by Gordy (Tr. 570) and as argued on brief (p. 33), is that having weathered the strike, it had a right to change its bargaining position based on its "new found economic strength." While there is no disputing the general assertion that a party that weathers a strike is free to use its new-found strength to obtain contractual terms it deems more favorable through a reduction or withdrawal of prestrike proposals, *O'Malley Lumber Co.*, 234 NLRB 1171, 1179 (1978), it is equally clear that a party may not do so where, as here, the economic leverage gained is the product of a strike precipitated by its own unfair labor practices. *Storer Communications*, 294 NLRB 1056 (1989). As the Respondent has not shown good cause for withdrawing its proposals from the bargaining table and reneging on prior agreements, the reasonable inference to be drawn, especially in light of its threats of plant closure, is that any interest the Respondent may have had in reaching a final agreement with the Union dissipated with the onset of the strike, and that Respondent's above conduct was designed to thwart the bargaining process, possibly until such time as the Cartersville facility became available for purchase.

Other indicia of Respondent's lack of good-faith bargaining include its failure to give the Union prior notice of its decision to permanently relocate all unit work to Cartersville and to close its Northumberland facility, *Metropolitan Teletronics*, 279 NLRB 957, 959 (1986), and its attempt on October 19, to steer the Union into effects bargaining when no bargaining had even taken place, or so much as proposals exchanged, on the relocation and plant closing decision itself. Significantly, the Respondent chose not to reveal to the Union until after negotiations had ended that day that it had prepared a "bullet points" proposal. I am convinced from Respondent's failure to provide a credible explanation for not turning over the proposal during the start or at any time during the October 19 session that this was simply part of Respondent's overall plan to avoid reaching agreement with the Union. The Respondent's refusal on November 6, to provide the Union with financial information needed to justify its demand for steep wage cuts and other economic concessions as the only means by which Northumberland would remain open, especially given the Union's stated willingness to agree to such concessions, provides further evidence of Respondent's bad faith. See *Reece Corp.*, 294 NLRB 448, 453 (1989).[36]

Finally, the Respondent's abrupt November 9 decision to engage in no further negotiations regarding its relocation and plant closing decision without so much as revealing which of the Union's counterproposals had been found acceptable and which were not, or affording the Union the opportunity to address and possibly modify those deemed unacceptable by Respondent, suggests that Respondent may not have anticipated the Union's willingness to agree to any of its regressive "bullet points" and that, faced with the possibility the Union might

[35] Respondent's claim, on brief (p. 39), that it was the Union which engaged in dilatory and bad-faith bargaining by failing to schedule more meetings, is lacking in merit. The Respondent's claim is premised on Mitchell's assertion that the parties had tentatively scheduled meetings for October 13, 14, and 15, but that McHugh canceled the latter two due to a conflict in his schedule (Tr. 653). McHugh, however, denied Mitchell's assertions (Tr. 303). Mitchell's testimony in this regard was not very convincing, while McHugh's denial was. Moreover, I find nothing in the parties' October 13, bargaining notes to suggest that such meetings had ever been scheduled. Rather, the notes indicate only that the parties agreed that October 19, would be their next meeting date.

Nor do I find merit to Respondent's further claim that the Union had sought to "drag out negotiations" by failing to submit a complete proposal prior to November 6 (R. Br. 40), for the Union's failure to come up with any proposals of its own was in large measure due to Respondent's failure to timely provide the Union with the requested information needed to prepare such proposals. Thus, the information requested by the Union on October 13, was not turned over to the Union until the October 19 session, despite Mitchell's promise that the information would be provided sooner, rendering the Union incapable of formulating proper proposals. In similar fashion, the "bullet points" proposal was not turned over to the Union until the start of the October 26 meeting even though Mitchell had the proposal with him during the October 19 session. Given the number of items contained in the Respondent's proposal, the Union could hardly have been expected to come up with counterproposals of its own on October 26, without first having reviewed and considered each of the "bullet points." By the time the parties next met on November 6, the Union had fully reviewed the "bullet points" and responded with counterproposals of its own. Given these circumstances, I find no basis for concluding that the Union engaged in dilatory bargaining, or was otherwise attempting to drag out negotiations.

[36] The General Counsel contends on brief (p. 45–46) that the failure to provide the Union with this information separately violates Sec. 8(a)(5) and (1) of the Act. However, except for the 8(a)(5) and (1) allegation relating to Respondent's refusal to provide the Union with information relating to its attendance policy, the complaint does not allege the refusal to provide the financial information as a separate violation. In the absence of any such allegation, I decline to find a violation as to Respondent's refusal on November 6, to comply with the Union's information request. The absence of such a finding, however, does not preclude me from considering Respondent's conduct as evidence of bad-faith bargaining.

acquiesce to its other concessionary demands and force the Respondent into an agreement it was striving hard to avoid, the Respondent opted to end any further talks on the decision itself, and proposed instead moving into effects bargaining. Having irrevocably decided to move to Cartersville and to close Northumberland, the Respondent, given its admission that it had no need for two separate facilities, could ill-afford to reach agreement with the Union that would force it to keep Northumberland open. Thus, I am convinced that it was the avoidance of this undesirable scenario, and not any business exigency, which compelled Respondent to abruptly terminate any further talks on the relocation and plant closure decision itself, despite having assured the Union at the end of the November 6 meeting that such talks would continue.

For all of the above reasons, I find that at all times following the start of the strike the Respondent engaged in bad-faith bargaining with the specific intent of not reaching agreement with the Union. Consequently, the Respondent's contention on brief that it reached valid impasse on November 6, is found to be without merit. As the parties were not at a lawful impasse, the Respondent was not at liberty to implement its relocation and plant closing decision. Having done so, I find that the Respondent, as alleged in the complaint, violated Section 8(a)(5) and (1) of the Act.

2. The 8(a)(3) and (1) allegation

The question remaining to be answered is whether, as alleged in the complaint, the Respondent's decision to relocate to Cartersville and to close Northumberland was motivated by antiunion considerations or by some other legitimate, nondiscriminatory reason. In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board announced a causation test to be used in all cases alleging violations of Section 8(a)(3) and (1) that turn on employer motivation. Under *Wright Line*, the General Counsel bears the initial burden of establishing a prima facie case by showing that the employer's decision was motivated at least in part by its employees' union or other protected activity, that the employer knew or had reason to be aware of such activity, and that it harbored antiunion animus. If the General Counsel is able to make such a prima facie showing, the burden will shift to the employer to show it would have taken the same action or, as in this case, made the decision, regardless of any Union or other protected activity the employees may have engaged in.

The General Counsel has made a strong prima facie showing that the Respondent's decision to relocate to Cartersville and to close its Northumberland facility was motivated by antiunion considerations, and more particularly because its employees chose to go out on a lawful strike, conduct which, regardless of its nature (economic strike or unfair labor practice strike) is protected under the Act. The Respondent's knowledge of the strike by employees is well established in the record and is not contested. The record is also replete with evidence of Respondent's antiunion animus that included, inter alia, the following: numerous threats to close Northumberland if employees struck or if they did not agree to Respondent's proposals; directing employees to bring their grievances to supervisors rather than to the Union; refusing to provide the Union with information on occurrences; unilaterally implementing a new employee attendance policy; and failing to give the Union prior notice of, and a timely opportunity to bargain over, its relocation and plant closing decision. On these facts, I conclude that the General Counsel has satisfied her initial *Wright Line* burden of proof. The burden now shifts to the Respondent to prove by a preponderance of credible evidence that it would have proceeded with the move to Cartersville and the Northumberland shutdown even if the strike had not occurred. The Respondent has not done so.

The Respondent, it should be pointed out, did not address itself to this particular allegation in its posthearing brief. Thus, except for the denial in its answer, the Respondent has presented no defense to the 8(a)(3) allegation that the relocation and plant closing decision was motivated by its desire retaliate against employees for going on strike. However, in connection with its defense to the 8(a)(5) allegation, the Respondent did assert that but for the strike it would not have been forced to look for an alternative production site. It argued, for example, that the decision to move work to Cartersville was motivated by legitimate business reasons, e.g., a need to maintain production and, as put by Sawyer, stop the financial "bleeding." Thus, notwithstanding the absence of a specific defense to the above 8(a)(3) allegation, I shall assume its argument to be that the decision to transfer unit work to Cartersville and to shut down its Northumberland plant was motivated solely by a need to maintain production, and not by antiunion considerations.

Several factors convince me that Respondent's decision to relocate to Cartersville and close its Northumberland facility was motivated more by a desire to retaliate against employees for going on strike than by a need to maintain production and "avoid economic suicide" (R. Br. 7). For one, there was no economic justification for Respondent to shut down the Northumberland facility, for by its own account Northumberland was its most profitable operation (R. Br. 7–8), with prestrike earnings totaling almost $300,000 per month, which represented 20 percent of Respondent's total revenue. By the start of 1995, the facility had, according to Gordy, exceeded all expectations in terms of production, efficiency, and profitability. The record makes clear that Respondent was quite pleased with the Northumberland facility and committed to its long-term operation, as evident by the fact that it had recently invested more than $100,000 in the facility, and had earmarked an additional $160,000 for further improvements in 1995, anticipating that 1995 would be a banner year (Tr. 527, 536).[37] In this regard, Gordy testified that given the "remarkable changes" that had taken place at Northumberland in recent years, "losing what we had accomplished certainly wasn't something I wanted to see happen nor anyone else wanted to see happen" (Tr. 528). The above facts make it perfectly clear that closing the facility would have made no economic sense to Respondent.

The Respondent, however, did precisely that on October 5, when it purchased Cartersville and decided to permanently transfer all unit work to that facility under the pretext that it was suffering heavy losses from a loss of production caused by the strike and had to find a way to stop the "bleeding."[38] I do

[37] The Respondent on brief took contrary positions regarding the state of the Northumberland plant. Thus, while asserting on the one hand that the facility "was simply out-dated and inefficient" (R. Br. 10), it stated elsewhere that Northumberland was its most profitable facility (R. Br. 7–8). The latter assessment was confirmed by Gordy who, as noted, testified that Northumberland had exceeded all expectations in terms production and efficiency (Tr. 528).

[38] As found above, the purchase of, and permanent transfer of unit work to, the Cartersville facility and the closure of the Northumberland

not suggest that Respondent suffered no losses due to the strike, for given its near 4-month long duration it is reasonable to believe that the strike would have resulted in a decrease in production and a drop in earnings for Respondent. However, if the Respondent's true goal in deciding to transfer work to Cartersville and to close Northumberland was to avoid any further losses caused by the strike, its concern in this regard was obviated on October 16, when the strikers unconditionally offered to return to work. By October 16, the Respondent had not yet transferred any work or equipment to Cartersville (R. Br. 5; G.C. Exh. 51).[39] Given these circumstances, I am convinced that the Respondent would have had little or no difficulty resuming normal production at Northumberland within a relatively short period of time. The Respondent does not contend otherwise. Thus, by October 16, Respondent's alleged reason for transferring all work to Cartersville and closing Northumberland, e.g., to resume production and prevent further losses caused by the strike, ceased to exist.

Yet, despite being presented with the opportunity to resume normal production and stop the "bleeding," the Respondent chose not to offer its more highly skilled striking employees immediate reinstatement as it was required to do, but opted instead to retain the bulk of its temporary work force for an additional 10 days or so, even though it found them to be unreliable and was losing "hundreds of thousands of dollars" by retaining them (R. Br. 7). Respondent's conduct in this regard convinces me that the need to maintain production had little to do with Respondent's decision to close its financially successful Northumberland facility, and that the reason for the closure was related more by a desire to retaliate against the strikers.

There is other evidence supporting the view that the closure of Northumberland was retaliatory in nature and not related to any production needs. On September 29, for example, Chitwood wrote to Marks recommending the closure of Northumberland because of the "striking employees intransigence on the mandatory overtime issue and their overall bitterness" (G.C. Exh. 50). The Chitwood memo provides clear evidence that the decision to close Northumberland had more to do with Respondent's animosity towards the strikers in general, and nothing to do with decreased production or a loss of earnings. There is also Marks' statements to a reporter for Working Woman magazine in May 1996, that the Northumberland strike was closed in response to an "ugly strike." Marks disputed that these were her exact words, and suggested they might have been the reporter's assumptions of what she said. She did, however, admit saying to the reporter that "sometimes it takes a real kick in the skirts for us to focus on what we should be doing" (Tr. 713–714). I am convinced Marks made the "ugly strike" comments to the reporter. Thus, while expressing "doubt" that she would have used such words, the fact remains that she never denied the substance of her remarks associating the closure of Northumberland with the "ugly strike." I find that along with her admitted "kick in the skirts" remark, Marks also made the "ugly strike" remark as quoted to her by the General Counsel at the hearing.

In summary, given the Respondent's repeated prestrike threats to close the facility should the employees walk out, I conclude from the above comments by Marks and Chitwood, and from the fact that as of October 16, Respondents stated justification for the permanent transfer of unit work to Cartersville and closure of Northumberland, its most profitable facility, had dissipated, that the Respondent was simply carrying out its prestrike threats when it decided to move all work out of and to close the Northumberland plant. The suggestion that the Respondent might have been able to operate more profitably in Cartersville because of its alleged proximity to customers in the south and because of the incentives being offered it by the State of Georgia does not negate the fact that what motivated Respondent to relocate in the first place was a desire to rid itself of its problem work force and to avoid any further bargaining obligation with the Union.[40]

For the above stated reasons, I find that the Respondent has not satisfied its burden under *Wright Line* of showing by a preponderance of the credible evidence that its decision to relocate to Cartersville and to close the Northumberland facility was motivated by legitimate business reasons, or that it would have made that decision even if the employees had not undertaken to go on strike. Accordingly, having failed to rebut the General Counsel's prima facie case, I find that Respondent's decision was indeed motivated by antiunion considerations and in violation of Section 8(a)(3) and (1) of the Act. See *Ford Bros*,. 294 NLRB 107, 133 (1989); *Strawsine Mfg. Co.*, 280 NLRB 553 (1986).

Alternatively, I agree with both the General Counsel and the Union that the Respondent's unlawful conduct in closing its Northumberland facility and moving to Cartersville while employees were engaged in an unfair labor practice strike was

plant were integral parts of the same decision, so that the fate of the Northumberland plant was sealed with the acquisition of the Cartersville facility.

[39] Respondent's Northumberland shutdown schedule reflects that the transfer of materials, along with the breakdown and transfer of equipment was to begin on or about November 6. Significantly, the timing of these events coincided with the last day of the parties' negotiations, suggesting that Respondent may have been intending since about October 5, to take the negotiations no further than November 6.

[40] Notwithstanding the alleged advantages offered by the Cartersville facility, it simply made no business sense for the Respondent to close what the Respondent concedes was its most profitable facility (R. Br. 7–8). As made clear by Gordy, the Northumberland facility was the northeastern regional supplier of dump trailers and it was more cost-effective to build dump trailers in Northumberland than it would be in Cartersville. Thus, while the move to Cartersville would have resulted in lower shipping and freights costs of flatbed trailers to its southern clients, with respect to its dump trailer production, the shipping and freight costs to its northeastern customers would obviously have been higher. Yet, strangely enough, Marks testified that Respondent's original intent when it closed on the Cartersville deal was to manufacture dump trailers at that facility, but decided against it. Although the Respondent had discontinued dump trailer production at Northumberland, conduct which was found to be unlawful in the underlying *Dorsey* case (321 NLRB 616), it had every intention of resuming such production, as evident by its purchase in July 1996, of Montone Trailers, located in Dillon, South Carolina, for this particular purpose (Tr. 702). Ironically, the freight and shipping costs factor that Respondent purportedly found so compelling in deciding to make the move from Northumberland to Cartersville obviously carried little weight in the decision to acquire the Montone facility, for the shipping and freight costs from Dillon, South Carolina, to Respondent's northeast dump trailer customers would clearly have been higher. Yet, the Respondent still had the Northumberland facility which it could have used for that purpose and which would have been more cost effective than manufacturing dump trailers in Dillon, South Carolina. That Respondent chose not to do so and was willing to incur higher costs is yet another indication that the Respondent was simply trying to avoid any further bargaining relationship with the Union at Northumberland.

"inherently destructive" of employee rights. In doing so without so much as prior notice to the Union, the Respondent rendered the negotiations meaningless, terminated a longstanding bargaining relationship with the Union, and displaced a work force of some 200 employees. By its above conduct, the Respondent not only demonstrated a latent hostility towards the collective-bargaining process, but also conveyed the clear message to employees it was their protected activity in going on strike which led to its imposition of the severest form or workplace punishment, plant closure and termination. In these circumstances, I find Respondent's conduct to have been so "inherently destructive" as to preclude the need for any further inquiry into its motivation. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967); See also *International Paper Co.*, 319 NLRB 1253, 1266 (1995), enfd. denied 115 F.3d 1045 (D.C. Cir. 1997). Accordingly, a finding of an 8(a)(3) and (1) violation is further justified under this alternative theory.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The strike that began on June 26, and ended on October 16, 1995, was at all times an unfair labor practice strike.
4. By directing employees to bring their grievances to supervisors before going to the Union, telling them not to talk to the Union without a supervisor's prior approval, or otherwise to do so only before or after work, telling them it would close the facility because it had no time to waste on negotiations, and threatening them with plant closure and job loss if they went on strike, the Respondent has violated Section 8(a)(1) of the Act.
5. By refusing to immediately reinstate strikers upon their unconditional offer to return to work, the Respondent has violated Section 8(a)(3) and (1) of the Act.
6. By unilateral implementing a new attendance policy on February 2, 1995, without first notifying and bargaining with the Union, the Respondent has violated Section 8(a)(5) and (1) of the Act.
7. By refusing to comply with the Union's December 21 information request for the number and dates of all occurrences issued to unit employees prior to 1995, and a listing of each location where the employee records are kept and/or maintained, the Respondent has violated Section 8(a)(5) and (1) of the Act.
8. By permanently transferring all bargaining unit work from its Northumberland, Pennsyvania facility to its Cartersville, Georgia facility and thereafter closing its Northumberland facility without first affording the Union reasonable notice of, and a meaningful opportunity to bargain over, said decisions, the Respondent has violated Section 8(a)(5), (3), and (1) of the Act.
9. The above-described conduct are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
10. The Respondent, except as set forth above, has engaged in no other unfair labor practices.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[41]

The General Counsel seeks, and I find no good reason not to grant, an order directing the Respondent to restore the status quo ante at Northumberland by reinstating its operations at that facility, making all unit employees, including unfair labor practice strikers, whole for losses they may have sustained due to Respondent's unlawful conduct, and bargaining in good faith with the Union over its decision to transfer all unit work to Cartersville and to close its Northumberland plant. Such remedial relief has been found by the Board to be appropriate in cases where, as here, an employer has permanently relocated all unit work to another location and closed its existing facility without giving a union prior notice of, and an opportunity to bargain over, that decision. An order requiring the reinstatement of operations, however, would not be appropriate if an employer can show that it would be unduly burdensome to do so. *Lear Siegler, Inc.*, 295 NLRB 853, 861 (1989); *Elliott Turbomachinery Co.*, supra at 143. The Respondent here has made no such claim either at the hearing or in its posthearing brief, despite having been put on notice through the complaint of the General Counsel's intent to seek a restoration order. In these circumstances, a restoration order is a fully appropriate and necessary remedy. See *Taylor Machine Products*, 317 NLRB 1187, 1217–1218 (1995).

Accordingly, I shall recommend that Respondent be ordered to reinstate operations at its Northumberland facility,[42] to bargain, on request, with the Union over its decision to relocate bargaining unit work Cartersville and to close Northumberland, and to reinstate all unit employees who were laid off or terminated when it relocated operations to Cartersville to their former jobs at Northumberland or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges. I shall further recommend that Respondent make said employees whole for any loss of earnings or other benefits they may have suffered as a result of Respondent's unlawful conduct, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on any such amounts to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To remedy its unlawful, unilateral implementation of a new attendance policy, the Respondent shall be ordered to, upon request from the Union, rescind that attendance policy and reinstate the attendance policy in existence prior to February 1, 1995, including its "Safety Bucks" and monthly drawing programs associated with that prior policy, and make unit employees whole for any losses suffered as a result of the change in policy, with interest, as set forth above. The Respondent shall also required to provide the Union with the information requested on December 21, 1994, and to post an appropriate notice.

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[41] I find that a broad cease-and-desist order is appropriate here given Respondent's demonstrated proclivity to violate the Act, as evident by the Board's findings in *Dorsey Trailers*, 321 NLRB 616 (1996), and the seriousness of the violations found herein.

[42] At the compliance stage of this proceeding the Respondent may introduce evidence, if any, that was not available prior to the unfair labor practice hearing, to show that restoration of production at its Northumberland facility would be unduly burdensome. *Lear Siegler*, supra 862.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[43]

ORDER

The Respondent, Dorsey Trailers, Inc., Northumberland, Pennsylvania plant, Northumberland, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Auto Workers International Union and its Local 1868, International Union, AFL–CIO, CLC, as the exclusive representative of its employees in appropriate unit described below, by failing to give the Union notice of and an opportunity to bargain over its decision to permanently transfer all unit work from its plant in Northumberland, Pennsylvania, to its Cartersville, Georgia facility, and over its decision to close its Northumberland plant. The appropriate unit includes:

> All production, maintenance and stock room employees of employed by the Employer at its Northumberland, PA plant, but excluding office clerical employees, professional employees, salesmen, guards, watchmen and supervisors as defined in the Act.

(b) Refusing to provide the Union with information on the number occurrences each unit employee has on file prior to 1995, the date of each employee's last occurrence, and a listing of each location where Respondent keeps and/or maintains employee records.

(c) Making unilateral changes in the employee attendance policy, including terminating the "Safety Bucks" and monthly drawing programs associated with that policy, without first notifying the Union and affording it an opportunity to bargain over such changes.

(d) Transferring its operations from Northumberland to Cartersville and thereafter closing the Northumberland facility because employees in retaliation for employees participating in an unfair labor practice strike, and denying immediate reinstatement to reinstate unfair labor practice strikers who have unconditionally offered to return to work.

(e) Threatening to close its Northumberland facility if an agreement for a successor contract could not be reached with the Union, or if employees voted to go out on strike, threatening employees with unspecified reprisals because of their Union sympathies, directing that they bring their grievances to the supervisors rather than to the Union so that the supervisor could decide whether they should take their grievance to the Union, and creating the impression that it was keeping employees' Union activities under surveillance.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reopen and reestablish its trailer manufacturing operation in Northumberland, Pennsylania, as it was prior to June 26, 1995, and upon request, bargain in good faith with the Union over its decision to transfer all unit work from Northumberland to Cartersville and to close the Northumberland facility and, if an understanding is reached, embody the same in a signed agreement.

(b) Upon request, rescind the attendance policy unilaterally implemented on February 1, 1995, reinstate the attendance policy in existence prior to that date, including the "Safety Bucks" and monthly drawing programs associated therewith, notify and bargain in good faith with the Union over any changes to be made to the attendance policy, and if an understanding is reached, embody the same in a written agreement. This order, however, is not to be construed as requiring the Respondent to rescind any improvements in the employees' terms and conditions of employment resulting from its implementation of the February 1, 1995 attendance policy.

(c) Within 14 days from the date of the Order, offer all unit employees, including unfair labor practice strikers, who were laid off or terminated due to the unlawful closure of that facility immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(d) Make all unit employees, including unfair labor practice strikers, whole for any loss of earnings or other benefits they may have suffered due to Respondent's unlawful conduct, including any losses resulting from the elimination of the "Safety Bucks" and monthly drawing programs, with interest, as described in the remedy section of this decision.

(e) Comply with the Union's December 21, 1994 information request by providing it with the number of occurrences issued to each unit employee prior to 1995, and the date of each employee's last occurrence, and with a listing of each location where Respondent keeps and/or maintains any employee records.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Northumberland, Pennsylvania facility, copies of the attached notice marked "Appendix."[44] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 30, 1995.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

[43] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[44] If this order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with United Auto Workers International Union and its Local 1868, International Union, AFL–CIO, CLC, which represents our employees in the appropriate unit described below, by failing to give it prior notice of and an opportunity to bargain over, our decision to permanently transfer all bargaining unit work from our Northumberland, Pennsylvania facility to our Cartersville, Georgia facility, and to close our Northumberland facility, and WE WILL NOT unilaterally change our employee attendance policy without first notifying and bargaining with the Union over the changes. The appropriate unit includes:

All production, maintenance and stock room employees of employed by the Employer at its Northumberland, Pennsylvania plant, but excluding office clerical employees, professional employees, salesmen, guards, watchmen and supervisors as defined in the Act.

WE WILL NOT refuse to provide the Union with information that is necessary for and relevant to the performance of its duties as exclusive bargaining representative of our unit employees.

WE WILL NOT retaliate against our employees who engaged in an unfair labor practice strike by permanently moving all unit work to Cartersville and closing our Northumberland facility, and WE WILL NOT refuse to offer immediate reinstatement to unfair labor practice strikers who have unconditionally offered to return to work.

WE WILL NOT threaten that our Northumberland, Pennsylvania facility will close in the event we do not reach agreement with the Union on a successor contract or because you vote to go on strike, WE WILL NOT threaten you with unspecified reprisals because of your union sympathies, WE WILL NOT instruct you to bring your grievances to a supervisor so that the supervisor can determine if you should take the grievance to the Union, and WE WILL NOT create the impression that your union activities are being kept under our surveillance.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL reestablish trailer manufacturing operations at our facility in Northumberland, Pennsylvania as it was prior to June 26, 1995, and WE WILL , on request, bargain in good faith with the Union with respect to the matters involved in this proceeding, including our decision to relocate bargaining unit work to Cartersville and to close the Northumberland facility, and the new attendance policy we implemented on February 1, 1995.

WE WILL offer all unit employees, including unfair labor practice strikers, who were laid off or terminated when we relocated our operations to Cartersville, Georgia, and closed our Northumberland plant, immediate and full reinstatement to their former or substantially equivalent positions, without regard to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings or other benefits they may have suffered due to our unlawful conduct, including any losses resulting from our unlawful discontinuance of the "Safety Bucks" and monthly drawing programs, with interest.

WE WILL rescind the attendance policy that was put into effect on February 1, 1995, and reinstate the old attendance policy that was in effect prior to February 1, 1995, including the "Safety Bucks" and monthly drawing programs.

DORSEY TRAILERS, INC.